

4503

No.....

**United States Circuit Court
of Appeals**

For the Ninth Circuit 8

FRED MERRILL,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

Transcript of Record

Upon Writ of Error to the District Court of the
United States for the District of Oregon

FILED
MAY 1908
U.S. DISTRICT COURT
DISTRICT OF OREGON

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

BARNETT H. GOLDSTEIN, E. M. MORTON, 1225 Yeon
Building, Portland, Oregon,
For the Plaintiff in Error.

JOHN S. COKE, United States Attorney; J. O.
STEARNS, JR., Assistant United States Attorney,
Federal Building, Portland, Oregon,
For the Defendant in Error.

CITATION ON WRIT OF ERROR

United States of America, District of Oregon, ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Fred Merrill, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said Dis-

trict, this 15th day of May, in the year of our Lord, one thousand, nine hundred and twenty-four.

CHAS. E. WOLVERTON,

Judge.

United States of America, District of Oregon, ss:

Service of the within Citation on Writ of Error accepted in Portland, Oregon, this 15th day of May, 1924.

J. O. STEARNS,

Attorney for Plaintiff.

Endorsed: Filed May 15, 1924.

G. H. MARSH, Clerk.

WRIT OF ERROR

The United States of America, ss.

The President of the United States of America.
To the Judge of the District Court of the United
States for the District of Oregon—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Chas. E. Wolverton, one of you, between United States of America, plaintiff and defendant in error, and Fred Merrill, defendant and plaintiff in error, a manifest error hath happened to the great damage of said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid. and, in this

behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. William Howard Taft, Chief Justice of the United States, this 15th day of May, 1924.

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. BUCK, Chief Deputy.

Endorsed: Filed May 15, 1924.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON
MARCH TERM, 1923

Be it remembered that on the 25th day of May, 1923, there was filed in the District Court of the

United States for the District of Oregon, an Information in words and figures as follows, to-wit:

Be it remembered, that J. O. Stearns, Jr., Assistant Attorney of the United States for the District of Oregon, who prosecutes in behalf and with the authority of the United States, comes here in person into Court at this term thereof, and for the United States gives the Court to understand and be informed that one Fred Merrill, the defendant above named, on, to-wit, the 10th day of May, 1923, at that place of business known as "The Plantation Inn," located on lot 11, section 3, T. 1 South, Range 3 East of the Willamette Meridian, in the District aforesaid, unlawfully and knowingly did have in his possession a quantity of intoxicating liquor, to-wit: whiskey and gin, fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume, in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Court Two

That Fred Merrill, the defendant above named, on, to-wit, the 10th day of May, 1923, at that place of business known as "The Plantation Inn," located on Lot 11, Section 3, T. 1 South, Range 3 East of the Willamette Meridian, in the State and District of Oregon, unlawfully and knowingly did sell a quantity of intoxicating liquor, to-wit: whiskey and gin, fit for beverage purposes and contain-

ing more than one-half of one per cent of alcohol by volume, in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT THREE

That Fred Merrill, the defendant above named, on, to-wit, the 10th day of May, 1923, at that place of business known as "The Plantation Inn," located on Lot 11, Section 3, T. 1 South, Range 3 East of the Willamette Meridian, in the State and District of Oregon, unlawfully and knowingly did maintain a common nuisance within the meaning of the National Prohibition Act, wherein intoxicating liquor, fit for beverage purposes, was then and there kept and sold in violation of the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Whereupon, the said United States Attorney for the District aforesaid prays the consideration of this Court here in the premises, and that due process of law may be awarded against the said Fred Merrill, defendant, in this behalf to make him answer to the United States touching and concerning the premises.

Dated at Portland, this.....day of May, A. D. 1923.

(Signed) J. O. STEARNS, JR.,
Assistant United States Attorney for the District
of Oregon.

United States of America, District of Oregon, ss.

I, J. O. Stearns, Jr., Assistant United States Attorney for the District of Oregon, being sworn, do say that the foregoing information is true as I verily believe.

(Signed) J. O. STEARNS, JR.

Subscribed and sworn to before me this 25th day of May, A. D. 1923.

G. H. MARSH,

Clerk of the United States District Court for the District of Oregon.

By E. M. MORTON, Deputy.

Endorsed: Filed May 25, 1923.

And afterwards, to-wit, on Friday, the 25th day of May, 1923, the same being the 68th Judicial day of the Regular March Term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294, May 25, 1923

Information: Sections 3 and 21, Title 2, National Prohibition Act.

Now at this day upon motion of Mr. Joseph O. Stearns, Jr., Assistant United States Attorney,

It is ordered that he be and is hereby allowed to file an information charging the defendant above named with the violation of Sections 3 and 21, Title 2, of the National Prohibition Act. And thereafter comes into court said defendant by Mr. Barnett H.

Goldstein, of counsel, and by his said counsel duly waives arraignment herein. Whereupon, on motion of said defendant,

It is further ordered that he be and is hereby allowed until Monday, May 28, 1923, at 2 o'clock p. m., to plead to said information.

And afterwards, to-wit, on Monday, the 28th day of May, 1923, the same being the 70th Judicial day of the Regular March Term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294. May 29, 1923

Indictment: Sections 3 and 21, Title 2, National Prohibition Act.

Now at this day come the plaintiff by Mr. Joseph O. Stearns, Jr., Assistant United States Attorney, and the defendant by Mr. Barnett H. Goldstein, of counsel, whereupon this being the time set for the entry of plea to the indictment herein, said defendant for plea to said indictment by his counsel says he is not guilty. Whereupon, on motion of plaintiff,

It is ordered that this cause be and the same is hereby set for trial for July 12, 1923.

And afterwards, to-wit, on the 18th day of January, 1924, there was duly filed in said court and cause the

VERDICT

of the jury, in words and figures as follows:

(Title)

We, the jury, duly impaneled to try the above entitled cause, do find the defendant Fred Merrill

Guilty as charged in Count One of the information herein;

Guilty as charged in Count Two of the information herein;

Guilty as charged in Count Three of the information herein.

Dated at Portland, Oregon, this 17th day of January, 1923.

(Signed) FRANK M. KIGHT,
Foreman.

Filed: January 18, 1924. G. H. Marsh, Clerk.

And thereafter and on the 7th day of February, 1924, there was filed in said court a

MOTION FOR NEW TRIAL

in words and figures as follows, to-wit:

(Title)

Comes now the defendant in the above entitled cause by Barnett H. Goldstein, his attorney, and moves the court to set aside the verdict rendered herein and to grant a new trial for the following reasons and upon the following grounds:

I.

That the Court upon the trial of the case admitted incompetent evidence offered by the United States.

II.

That the Court upon the trial of the case excluded competent evidence offered by the defendant.

III.

That the Court upon the trial of the case improperly limited and restricted the cross-examination of certain witnesses offered by the United States.

IV.

That the Court improperly instructed the jury to defendant's prejudice.

V.

That the Court improperly refused, to defendant's prejudice, to give correct instructions tendered by the defendant.

VI.

That the verdict is not supported by evidence and is contrary to the law of the case.

BARNETT H. GOLDSTEIN,

Attorney for Defendant.

Filed February 7, 1924. G. H. Marsh, Clerk.

And on the said 7th day of February, 1924, there was filed in said court and cause a

MOTION IN ARREST OF JUDGMENT

in words and figures as follows, to-wit:

(Title)

Now, after verdict against the said defendant

and before sentence, comes the herein named defendant in his own person and by Barnett H. Goldstein, his attorney, and moves the court to arrest judgment herein and not to pronounce same for the following reasons:

I.

On the ground and for the reason that the information filed herein is not properly verified.

II.

Upon the ground and for the reason that Count I of the information does not state facts sufficient to constitute an offense or crime against the laws of the United States.

III.

Upon the ground and for the reasons that the verdict upon Count III of the Indictment is not supported by any evidence in the case.

IV.

Upon the ground and for the reason that the verdict upon Counts I, II and III and on each Count thereof is contrary to law.

FRED T. MERRILL,

Defendant.

BARNETT H. GOLDSTEIN,

Attorney for Defendant.

Filed, February 7, 1924. G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 18th day of February, 1924, the same being the 87th Judicial day of the Regular November Term of said Court;

present the Honorable Charles E. Wolverton, U. S. District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294 February 18, 1924.

Indictment: Sections 3 and 21, Title 2,

National Prohibition Act

Now at this day come the plaintiff by Mr. J. O. Stearns Jr., Assistant U. S. Attorney, and the defendant above named in his own proper person and by Mr. B. H. Goldstein, of counsel, whereupon this cause comes on to be heard by the Court on the motion for a new trial, and the Court, having heard the arguments of counsel, and being fully advised in the premises, upon consideration thereof

It is ordered that said motion be and the same is hereby denied. Whereupon, on motion of said defendant,

It is ordered, that he be and is hereby allowed to Saturday, February 23, 1924, at 10 o'clock a. m., for sentence upon the verdict herein; and

It is further ordered that he be and is hereby allowed 30 days further time to submit his bill of exceptions herein.

And afterwards, to-wit, on Monday, the 25th day of February, 1924, the same being the 92nd Judicial day of the Regular November Term of said Court; present the Honorable Charles E. Wolverton, U. S. District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294 February 25, 1924.

Information: Sections 3 and 21, Title 2.

National Prohibition Act

Now at this day come the plaintiff by Mr. J. O. Stearns, Jr., Assistant U. S. Attorney, and the defendant aboved named in his own proper person and by Mr. Barnett H. Goldstein, of counsel, whereupon, this being the day set for the sentence of said defendant upon the verdict heretofore returned by the jury herein,

It is adjudged that said defendant do pay a fine of \$250.00 on Counts 1 and 2 of the Information, and that he be imprisoned in the county jail of Multnomah County, Oregon, on Count 3 of the Information, for the term of six months, and that he stand committed until this sentence be performed or until he be discharged according to law. Whereupon on motion of said defendant

It is ordered, that he be and is hereby allowed a stay of execution for 45 days from this date, in which to submit his bill of exceptions.

And afterwards, to-wit, on the 15th day of May, 1924, there was duly filed in said Court a

PETITION FOR WRIT OF ERROR

in words and figures as follows, to-wit:

(Title)

No. C-10294

To the Honorable Charles E. Wolverton, Judge of the above entitled Court:

Your petitioner, Fred Merrill, plaintiff in the above entitled cause, now comes and presents this his petition as plaintiff in error for a Writ of Error to the District Court of the United States, for the District of Oregon, and shows:

That on the 25th day of February, 1924, there was rendered and entered in the above entitled court and cause a judgment wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the county jail of Multnomah County for a term of six months and to pay a fine of \$250.00 and to stand committed until said sentence be performed or until it be discharged according to law.

And your petitioner further shows that he is by counsel advised that there are manifest errors in the record and proceedings of and in said cause in the rendition of said judgment of sentence, greatly to the damage of your petitioner, all of which errors will be made to appear by an examination of the record in said cause and by the Bill of Exceptions tendered and filed herein by your petitioner and in the assignments of error filed herewith.

To the end, therefore, that the said judgment and sentence and proceedings in said cause may be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner prays that a Writ of Error may be issued therefrom, directed to the United States District Court for the District of Oregon, returnable according to law and

to the rules of this Court, and that there also be directed to be returned therewith, pursuant thereto, a true copy of the record, Bill of Exceptions, Assignments of Error and all relative proceedings had in said cause; that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any there be, may be fully corrected and full and complete justice done your petitioner. And your petitioner now makes and files herewith his Assignments of Error, upon which he will rely, and the proof of which will be made to appear by the return of said record in obedience to said writ.

Wherefore, your petitioner prays that a writ of error issue as hereinbefore prayed for and prays that his assignments of error filed herein be considered as his assignments of error upon said writ and that the judgment entered in this cause be reversed and held for naught, and said cause remanded for further proceedings and that an order be made fixing the amount of security which said petitioner shall furnish upon said writ of error and that upon the giving of such security all proceedings in the District Court of the United States for the District of Oregon be suspended and stayed until determination of the said writ of error.

BARNETT H. GOLDSTEIN,

E. M. MORTON,

Attorneys for Petitioner.

Filed, March 15, 1924. G. H. Marsh, Clerk.

An thereafter and on the 15th day of May, 1924, there was filed in said court and cause

ASSIGNMENTS OF ERROR

in words and figures as follows:

(Title)

Now comes the plaintiff in error, the defendant above named, by his counsel, and presents this assignments of error, containing the assignments of error upon which he will rely in the United States Circuit Court for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the court of the trial of said case.

I.

That the trial court erred in denying the defendant's motion to dismiss the information filed herein on the ground and for the reason that the same was not issued upon proper affidavit, showing probable cause.

II.

That the trial court erred in denying defendant's motion to dismiss Counts I and III of the information filed herein upon the ground and for the reason that said counts do not state facts sufficient to constitute an offense or crime against the laws of the United States.

III.

That the trial court erred over the objection and exception of the defendant in admitting the follow

ing evidence testified to by Milton O. Nelson, a witness for the government:

Q. I will ask you, Mr. Nelson, if you know the reputation of the Twelve Mile Road House or Plantation Inn, as to being a place where intoxicating liquor is commonly kept and dispensed?

* * * * *

A. Yes, sir.

Q. What is that reputation—good or bad?

A. Bad.

IV.

That the trial court erred over the objection and exception of defendant in limiting and restricting the cross-examination of said witness, Milton O. Nelson, so as to show his motive and interest in the prosecution of this case, and in permitting the prosecution to examine him as to his interest when no like opportunity was afforded the defendant.

V.

That the trial court erred over the objection and exception of the defendant in admitting the following evidence testified to by W. H. Nickell, a Government witness:

Q. Did you ever work for Fred Merrill?

A. I did.

Q. Where was it you worked for him, Mr. Nickell?

A. Twelve Mile Road House.

Q. When was it that you worked for Mr.

Merrill, if you can remember?

A. I think it was in April.

Q. Of what year?

A. 1923.

* * * * *

Q. You say you worked in April. About how many days did you work altogether, Mr. Nickell?

A. Ten or twelve days.

Q. What did you work at at the Twelve Mile Roadhouse for Mr. Merrill?

A. Worked as waiter.

* * * * *

Q. During the time you worked there, did parties come out during the night time and eat at his place?

A. Yes.

COURT: You are trying to prove now instructions given by Merrill to him?

Mr. Bynon: Yes, your Honor; also that this particular witness saw Mr. Merrill dispense liquor there and that liquor was handled there, that Mr. Merrill took part in it.

* * * * *

Q. You may state to this jury, Mr. Nickell, what instructions Mr. Merrill gave you concerning liquor, if parties should ask for liquor there.

A. Mr. Merrill instructed me to call for him.

A. What did he say about what he would do?

A. He said that he might be able to send out and get it.

* * * * *

Q. Now, can you recall an instance, or two or three or more where you did carry out those instructions?

* * * * *

A. The first bottle he sold was a bottle of cocktails. He called it cocktails, and sold it for \$7.50. The next bottle he sold he sold it for \$8.00. The party happened to be a friend of mine. He said, "Waiter, will you drink with me?", and I said, "Yes."

Q. Did you take some of the liquor?

A. Yes.

* * * * *

Q. Now, I will ask you if you can recall another instance when the defendant Merrill sold a bottle of liquor out there in your presence.

A. He sold another bottle, I believe, for \$10 to California tourists. He also sold at the same time a dollar's worth of oranges or something.

* * * * *

Q. Now, Mr. Nickell, so much for bottles. I will ask you, while you were out there working for Mr. Merrill, can you remember instances where Mr. Merrill sold intoxicating liquor over the bar to drink?

A. We had a case out there one night . . .

Q. I can't hear you.

A. We had a case out there one night were a man was addressed as Judge. I think there was six in the party, and the dinner was a dollar and a half apiece, I believe, and the check was \$44.00.

VI.

That the trial court erred over the objection and exception of the defendant in admitting in evidence a certified copy of the record of the case of State of Oregon vs. Fred T. Merrill, purporting to show that on September 6, 1910, the defendants pleaded guilty to the offense of selling liquor in quantities less than a gallon.

VII.

That the trial court erred over the objection and exception of the defendant in refusing to permit the said defendant to explain said record of conviction.

VIII.

That the trial court erred over the objection and exception of the defendant in refusing to permit proper cross-examination by defendant of Ethel V. Johnson, a witness for the Government upon matters affecting her credibility and interest in the case,

IX.

That the trial court erred over the objection and exception of the defendant in refusing to permit

the cross-examination by defendant of A. B. Gates, a Government witness, as to matters affecting his credibility and interest, to-wit: as to the place where he had refreshed his recollection by referring to his testimony given at the former trial.

X.

That the trial court erred over the objection and exception of the defendant in not requiring said witness A. B. Gates to answer on cross-examination the following question:

Q. Where did you read it? (his testimony in the former trial).

XI.

That the trial court erred over the objection and exception of the defendant in refusing to permit the cross-examination by defendant of A. B. Gates, a Government witness upon matters affecting his credibility and interest, to-wit: As to the general instructions he received for the investigation of the various road houses he raided, which included that conducted by the defendant.

XII.

That the trial court erred over the objection and exception of defendant in not requiring the said witness A. B. Gates to answer on cross-examination the following question:

Q. All these eight road houses that you investigated, you went out with these two ladies?

XIII.

That the trial court erred over the objection and

exception of defendant in not requiring the said witness A. B. Gates to answer in cross-examination the following question:

Q. I will ask you if it is not a fact that prior to going out to Mr. Merrill's place, you had a general discussion, at which Mrs. Johnson, Miss Meade and the Sheriff's office or some one else was present, concerning the methods that you were to use in investigating these roadhouses?

XIV.

That the trial court erred over the objection and exception of the defendant in limiting and restricting the scope of the cross-examination of A. B. Gates, a witness for the Government, he being an interested witness, upon matters affecting his credibility, motive and interest, to-wit; as to the methods employed by him in making the investigation of said road houses, said examination being necessary to show that he transported and used liquor in these investigations as a means of entrapping and inducing the owners of said road houses to violate the law.

XV.

That the trial court erred over the objection and exception of defendant in not requiring the said witness A. B. Gates to answer on cross-examination, the following question:

Q. Is it not a fact that, during the course

of your investigation of these road houses, you did take out liquor with you which you used as the basis for swearing out a warrant of arrest against a party in whose place you brought the liquor?

XVI.

That the trial court erred over the objection and exception of defendant in not requiring the said witness A. B. Gates to answer on cross-examination the following question:

Q. Now, I will ask you, Mr. Gates, if at any time prior to May 10th in making your investigations you had occasion to use liquor as a means of inducing violation of law?

XVII.

That the trial court erred over the objection and exception of defendant, in not requiring A. B. Gates to answer on cross-examination the following questions:

Q. On the very first time you went out on a liquor investigation, stating that you had never taken a drink except on business, how did you at that time know the difference between the various kinds of liquor, without ever having had occasion to drink it except on business?

XVIII.

That the trial court erred over the objection and exception of defendant in not requiring the said

witness A. B. Gates to answer on cross-examination the following questions:

Q. In your examination you said you feigned intoxication for atmosphere. When did you begin to do that?

A. When I went out and hired a cab.

Q. That was atmosphere for what?

A. So I would not be detected; so that he would think that I wasn't no spotter or anything like that, or a man going out looking for no information in regards to the road houses.

Q. You wanted him not to think you were a spotter, which you were?

Mr. Stearns: If your Honor please. . . .

COURT: I will sustain the same objection to that question.

Mr. Goldstein: Save an exception.

XIX.

That the trial court erred in holding the ruling that the said witness, A. B. Gates, could not be cross-examined as to show the methods employed by him in connection with these same investigations and in refusing to allow questions of this nature to be propounded to the witness:

Mr. Goldstein: I will ask him the question, and then please may I take an exception in the record, to show the purpose of these questions and to show the methods employed by him along those similar lines I am asking him about.

COURT: At other places?

Mr. Goldstein: In connection with that particular employment.

COURT: The Court will not permit you to ask those questions. I have ruled on that once or twice. I tried to make myself plain.

Mr. Goldstein: I understand, if the Court please. I want the record to show.

COURT: You will not be permitted to go out and examine this witness as to other road houses, and what he did at those places. I might as well put a stop to that right now.

Mr. Goldstein: I am not going to pursue that any further as to this witness, only as it might affect his credibility as a witness. That is the only purpose, for the purpose of showing his motive and interest. May I have an exception to your Honor's ruling?

XX.

That the trial court erred over the objection and exception of defendant in not permitting the following cross-examination of said witness, A. B. Gates:

Q. Did you have your chicken dinner?

A. Yes, sir.

Q. How much did you pay for the dinner?

A. \$3 a plate.

Q. Do you want the jury to understand that Mr. Merrill charges three dollars a plate for chicken dinners?

Mr. Stearns: It is not what he wants the jury to understand. It is what is the fact.

COURT: He has answered the question that they paid \$3 a plate for it. I don't think it is necessary to inquire as to what they generally charge for these dinners.

Mr. Goldstein: You say I cannot ask him if he knew what the general charge was for a chicken dinner?

COURT: No.

Mr. Goldstein: Can I ask him why it was he paid it without protest if he knew what the general charge would be for a chicken dinner?

COURT: No, you cannot ask him that.

XXI.

That the trial court erred over the objection and exception of defendant in limiting and restricting the scope of the cross-examination of Miss Ruth Meade, a witness for the Government, as to matters affecting her credibility and for the purpose of impeachment, to-wit: as to statements she had previously made as to the nature of her instructions in the matter of making these investigations.

XXII.

That the trial court erred over the objection and exception of defendant in not requiring the said witness Miss Ruth Meade to answer on cross-examination the following question:

Q. I will ask you if it is not a fact, that during those three days investigating those

roadhouses, there were three or four times when such liquor was taken out?

XXIII.

That the court erred over the objection and exception of defendant in limiting and restricting the scope of the cross-examination of said witness, Miss Ruth Meade, as to matters affecting her credibility and interest and on refusing to allow questions for the purpose of determining the general instructions as to these investigations, as follows:

Q. Did you know you were required to play the piano for atmosphere.

A. No, I did not.

Q. You claim you did that of your own volition?

A. I did.

Q. Isn't it a fact that you played the piano in all these eight road houses?

XXIV.

That the trial court erred over the objection and exception of the defendant in not permitting the full and sufficient cross-examination by the defendant of A. B. Gates, Ethel B. Johnson, and Ruth Meade, interested witnesses, called on behalf of the Government.

XXV.

That the trial court erred over the objection and exception of defendant, in admitting the following evidence testified by Miss Martha Randall, a witness for the Government.

Q. Now, Miss Randall, you may state whether or not you knew Mrs. Johnson and Miss Meade to be reliable, responsible girls at the time that you recommended them for that mission?

A. I knew them to be reliable, respectable women.

XXVI.

That the defendant was prejudiced by the following remarks made by the Court during the examination of Miss Martha Randall, a witness for the Government.

Q. Now, with respect to the possibility of their having to drink out there

COURT: I don't think you need go into that.

Mr. Stearns: Well, perhaps not. It was brought out by the counsel.

COURT: I know it was brought out, but it is wholly immaterial.

Mr. Stearns: That is true, your Honor. It is.

Mr. Goldstein: I take exception to your Honor's remarks about that.

COURT: Well, I want to put an end to this.

XXVII.

That the trial court erred over the objection and exception of defendant in admitting the testimony of H. L. Barker, a Government witness, as to liquor alleged to have been found by him at the defendant's place on May 15th.

XXVIII.

That the trial court erred over the objection and exception of the defendant in admitting in evidence testimony of P. B. Rexford, a Government witness, as to liquor alleged to have been found by him at defendant's place, on May 15th.

XXIX.

That the trial court erred over the objection and exception of the defendant in limiting and restricting the cross-examination of said witness P. B. Rexford, as to the road houses searched by him on May 15th, the same day that the search of defendant's place was alleged to have been made.

XXX.

That the trial court erred over the objection and exception of the defendant in refusing to require Lloyd Linville, a Government witness, to answer on cross-examination the following question:

Q. You desire to leave the inference, do you not, by that testimony, that Mrs. Merrill emptied the liquor?

XXXI.

That the court erred over the objection and exception of the defendant in refusing to admit in evidence the testimony of Ada Eades, a witness for the defendant, as to the conduct of the business of this defendant subsequent to September, 1923.

XXXII.

That the trial court erred over the objection and

exception of the defendant in refusing to admit in evidence the testimony of C. E. Carroll, a witness for the defendant, as to the general reputation of A. B. Gates, a Government witness, for truth and veracity.

XXXIII.

That the trial court erred over the objection and exception of the defendant, in limiting and restricting the testimony of Mrs. Fred T. Merrill, a witness for the defendant.

XXXIV.

That the trial court erred over the objection and exception of defendant in not permitting Russell Underwood, a witness for the defendant, to testify as to matters material to his defense, to-wit: as to instructions received by him concerning the use of liquor by his patrons.

Q. As such waiter did you receive any instruction from Mr. Merrill concerning liquor or the use of liquor by the guests.

Mr. Stearns: Just a moment, if your Honor please. If that question is confined to the time prior to Mr. Merrill's arrest, I have no objection; but if it is since then it would be a self-serving declaration, and would not be admissible, I think.

Mr. Goldstein: This is prior to May 15th, which is one of the alleged acts of nuisance. He was working prior to that time. I imagine your Honor would rule I could prove anything im-

mediately prior, immediately subsequent, so long as it is close enough to the alleged occurrence of the nuisance to show how the place was being conducted.

COURT: Confine it to the 15th.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: Yes.

Mr. Goldstein: I understand the Court has ruled that I cannot show by this witness the method of conducting the place of business immediately after May 15th?

COURT: No.

XXXV.

That the trial court erred over the objection and exception of defendant in not sustaining defendant's objection to the following question propounded by the prosecution to said witness Russell Underwood.

Q. How long since you and your wife have been living together, Mr. Underwood?

XXXVI.

That the court erred over the objection and exception of defendant in not permitting E. W. Alsworth, a witness for defendant, to explain his testimony as to the good reputation of the Twelve Mile House.

XXXVII.

That the court erred over the objection and ex-

ception of defendant in not permitting J. J. Braund, a witness for the defendant, to testify as to what people said subsequent to May 10th about the reputation of defendant's place as of May 10th, as follows:

Q. Now, with whom else had you discussed the reputation of Mr. Merrill's place prior to the 3rd day of May, 1923?

COURT: The 10th day.

Mr. Goldstein: Prior to when?

Q. I should say the 10th day of May, 1923?

A. Well, I don't know as we discussed so much before that, but after he was arrested, why, there was a lot of discussion around there.

Q. We are not interested in the discussion that took place afterwards, but we are interested in the reputation at the time and prior to the time that the raid was made.

Mr. Goldstein: I object to the limitation of the question, on that ground, that he might know the reputation on or about May 10th, and it might be by reason of some conversations he might have had with the neighbors subsequent to May 10th.

COURT: I don't think that could be taken into account.

XXXVIII.

That the court erred over the objection and exception of the defendant in not requiring T. H.

Hurlburt, a Government witness, to answer on cross-examination, the following questions:

Q. Who paid his expenses, Mr. Hurlburt?

Mr. Stearns: Now, if your Honor please, this is really not cross-examination.

Mr. Goldstein: This is for the purpose of impeachment, purpose of credibility. I want to know what arrangements he had with Mr. Gates. Mr. Stearns asked him whether he had made arrangements with Mr. Gates on May 10th for the purpose of raiding roadhouses. He also asked him how long he had known Mr. Gates. I am at this time attempting to ascertain from Mr. Hurlburt whether Mr. Gates had been in his employ prior to that time, what he had been employed for, and what arrangements he made with him on May 10th. That he went into on direct examination. I believe it is open on cross-examination to determine the extent of his employment of Mr. Gates, if he was employed.

COURT: That is the very question the Court has tried to keep out of this case from the very beginning. It will not be opened up now.

Mr. Goldstein: May I ask who paid his expenses; who paid the expenses of Mr. Gates?

COURT: That is immaterial. It is not cross-examination.

XXXIX.

That the court erred over the objection and exception of defendant in not requiring said witness, T. H. Hurlburt, to answer on cross-examination the following question:

Q. Is it not a fact you employed him, (Gates), for the purpose of using him as a witness in these roadhouse cases?

Objected to.

COURT: The objection to that will be sustained. That is not cross-examination.

Mr. Goldstein: May I ask how long his employment is to continue?

Mr. Stearns: If your Honor please, it doesn't matter.

COURT: I will not permit you to pursue that.

Mr. Goldstein: May I have an exception. I think I have made it clear that I am endeavoring to ascertain certain information about the nature of his employment.

COURT: Well, you will not be permitted to ask that. He has a right to employ this man. He is not required to give his reasons for it, either.

XL.

That the trial court erred in charging the jury as follows:

“Now, the question involved in this case is a question of fact: Do you believe from the testi-

mony beyond a reasonable doubt, that, at the time or about the time stated in the information, the defendant Merrill had possession of intoxicating liquor? If so, and you do so believe, then you should find him guilty as charged in the first count of the information.” and in failing to add that mere possession must be “possession with intent to sell.”

XLI.

That the trial court erred in charging the jury as follows:

“It is also charged that at the same time he maintained a common nuisance, that is, a place where intoxicating liquor was kept, bartered and sold. Now, a single sale, without more, would not constitute a nuisance. But if, however, a sale is made in a place fitted up for the transaction of business, and in the ordinary court of business, as if one should approach a bar in the business house, ask for and obtain intoxicating liquor from the manager or person in attendance, although there was but one purchase, it would be sufficient to justify the jury in finding that it was a common nuisance, or a place where intoxicating liquors were kept, bartered and sold.”

XLII.

That the trial court erred in charging the jury as follows:

“There has been some evidence offered in the trial of this case tending to show that the establishment conducted by the defendant and known as the Twelve Mile Roadhouse, bore a common reputation as being a place where intoxicating liquor was kept and sold, and I instruct you that that is competent evidence and should be considered by you in determining whether or not the defendant is in fact guilty of maintaining a nuisance at the time and place and in the manner charged in the information.”

XLIII.

That the trial court erred in charging the jury as follows:

“A subsequent raid, as you will remember by the testimony, was made upon the roadhouse of date May 15th. This you may take into consideration, and what happened and what was found there, on the question whether the defendant was maintaining a nuisance as charged, and that testimony must be considered in that light, and that is the purpose for which the Court admitted it here.”

XLIV.

That the trial court erred in charging the jury as follows:

“It is also in evidence that, after these parties arrived at the roadhouse, they feigned, as one of the witnesses said, intoxication; if they

were not really intoxicated, they at least feigned intoxication. Now, if they did that, and the sale was made as claimed by the Government, it would be no defense in this case. One cannot be induced and persuaded by a Government officer to commit a crime, and then be prosecuted but a Government officer may lawfully afford an opportunity for the commission of an offense, and the testimony of the Government in this case tends to show that that is all these Government witnesses did. They went out to this roadhouse; they, as one of them said, attempted to create an atmosphere that would make it possible for them to buy liquor at that place. You may not approve of that method. It may not be the best method. I don't know. But it would be no excuse or defense for the violation of the law. It may go to the credibility of the witnesses, but if you believe that the sale was made as claimed, then it would be a violation of the statute.

XLV.

That the trial court erred in refusing to give the jury the following instructions:

“In connection with the charge against the defendant for maintaining a nuisance, where intoxicating liquor was kept or sold, I instruct you that the word “maintain” as used in the prohibition act means “continuance” and implies a certain degree of “permanence”. Con-

gress by the use of the words "kept and sold" in violation of law, means either habitually or continually or recurrently so "kept and sold". In other words, a single act or a single sale is insufficient. I therefore instruct you that to constitute a nuisance, the prosecution must satisfy you by evidence beyond a reasonable doubt of the continuance and recurrence of acts or sales in violation of the law. If the evidence falls short of that required proof, your verdict should be for the defendant."

XLVI.

That the trial court erred in refusing to give the following instructions:

"The evidence in this case tends to show that Mr. Gates and his associates went upon the premises in question with their own liquor and it is contended by the defendant that they did so with the specific purpose of using their own liquor as a means of entrapping the defendant, in committing a violation of the law. I instruct you that the first duty of officers of the law is to prevent and not to punish crime and it is not their duty to incite or create crime for the sole purpose of prosecuting and punishing it. A conviction will not be sustained where the officers originate the intent and apparently join in the criminal act, first suggested by the officers merely to entrap the defendant."

XLVII.

That the trial court erred in refusing to give the following instructions:

“Therefore, if you believe that the defendant was induced by the importunity of the officers to violate the law, that is, if he did violate it, and if through their inducement, he sold the liquor or permitted them to drink the liquor on his premises, then you should return a verdict of not guilty, as it is against the policy of the United States Courts to sanction a conviction in any case where the offense was committed through the instigation of public agents.”

XLVIII.

That the trial court erred over the objection and exception of the defendant in failing and refusing to instruct the jury upon the defendant's theory of his defense in the case.

XLIX.

That the trial court erred in failing to instruct the jury that it had no right to take into consideration the testimony of Nickell, a Government witness, as proof of the specific charges set forth in the information, and that it should be strictly limited to the question as to whether or not the defendant maintained a nuisance, and for no other purpose.

L.

That the trial court erred in failing to instruct the jury that it should consider the evidence offered

by the defendant tending to show that the establishment conducted by the defendant bore a good reputation, on the question whether he was maintaining a nuisance thereat as charged in the information.

LI.

That the trial court erred in denying defendant's motion for a new trial upon the following grounds:

- (a) That the Court admitted incompetent evidence offered by the Government.
- (b) That the Court excluded competent evidence offered by the defendant.
- (c) That the Court improperly limited and restricted the cross-examination of certain Government witnesses, to-wit: A. B. Gates, Ruth Meade, and Ethel Johnson.
- (d) That the Court improperly instructed the jury to the defendant's prejudice.
- (e) That the Court improperly refused to defendant's prejudice to give instructions tendered by the defendant.
- (f) That the verdict was not supported by the evidence and is contrary to the law of the case.

LII.

That the trial court erred in denying defendant's motion in arrest of judgment upon the following grounds:

- (a) That the information filed herein was not properly verified.

- (b) That Counts I and III of the information do not state facts sufficient to constitute an offense of crime against the United States.
- (c) That the verdict upon Count III is not supported by the defendant.

LIII.

That the trial court erred in rendering judgment against defendant on the verdict of this case.

Wherefore, the defendant, plaintiff in error, prays that the above and foregoing assignments of error be considered as his assignments of error upon the writ of error; and further prays that the judgment heretofore entered in this case may be reversed and held for naught and that the plaintiff in error, defendant above named, have such other and further relief as may be in conformity to law and practice of this Court.

BARNETT H. GOLDSTEIN,

E. M. MORTON,

Attorneys for Defendant and Plaintiff in Error.

Filed May 15, 1924. G. H. Marsh, Clerk.

And thereafter and on the 15th day of May, 1924, there was duly made and entered in said court and cause an

ORDER ALLOWING WRIT OF ERROR

in words and figures as follows, to-wit:

(Title)

Upon reading and filing petition of plaintiff in

error above named for an order allowing him to procure a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of Oregon, it appearing that defendant having filed herein the assignments of error relied upon,

It is now hereby ordered, that said petition be and the same is hereby allowed, and that a writ of error issue as in said petition prayed for and that a citation be issued and served herein.

And it is further ordered, that said writ of error operate as a supersediary and that the defendant be admitted to bail upon the penal sum of \$2000, according to law, to be approved by the undersigned.

(Sgnd.) CHAS. E. WOLVERTON,
Judge.

Filed May 15, 1924. G. H. Marsh, Clerk.

And thereafter and on the 15th day of May, 1924, there was filed in said court and cause

BAIL BOND ON WRIT OF ERROR

in words and figures as follows, to-wit:

(Title)

KNOW ALL MEN BY THESE PRESENTS:

That I, Fred Merrill, as principal, and Arthur H. Johnston and Ray Barkhurst of the County of Multnomah, State of Oregon, as sureties, are by these presents firmly held and bound under the United States of America in the full sum of \$2000.00, to be paid to the United States of Amer-

ica, to which payment well and truly to be made we bind ourselves, our heirs, assigns and successors, executors, and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 12th day of May, 1924.

Whereas, on the 25th day of February, 1924, at Portland, Oregon, in the District Court of the United States, for the District of Oregon, in the case pending in said court between the United States of America, Plaintiff, and Fred Merrill, Defendant, and judgment and sentence was rendered against the said Fred Merrill, and

Whereas, the said Fred Merrill has obtained a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, directed to the District Court of the United States to reverse the judgment and sentence in said cause, and also a citation directed to the said United States of America citing and admonishing said United States of America to be and appear in said Court thirty days from and after the date of said citation, which citation has been duly served upon the United States of America.

Now, therefore, the condition of this obligation is such that if the said Fred Merrill shall appear in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument as required by law and by rule of said Court, and from day to day thereafter until said cause

shall be finally disposed of and shall abide by and obey the judgment and all orders made by said Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of said judgment and sentence appealed from as the said Court may direct if said judgment and sentence again may be affirmed, then the above obligation to be void, otherwise, to remain in full force and effect.

FRED T. MERRILL,
Principal.

ARTHUR H. JOHNSTON
Surety, residing at 1075 Cumberland Ave.

RAY BARKHURST,
Surety, residing at 548 E. 24th St. N.

State of Oregon, County of Multnomah—ss:

I, Arthur H. Johnston, and I, Ray Barkhurst, whose names are subscribed to the foregoing obligation as surety, being first duly sworn, do on oath depose and say: That I am a free holder and resident within the State of Oregon and am worth the sum of \$4000.00 over and above all my just debts or liabilities, exclusive of property exempt from execution.

ARTHUR H. JOHNSTON,
RAY BARKHURST.

Subscribed and sworn to before me this 12th day of May, 1924.

B. H. GOLDSTEIN,
Notary Public for Oregon.

My Commission expires:

The foregoing bond is approved by me this 15th day of May, 1924.

(Sgnd.) CHAS. E. WOLVERTON,
Judge.

Filed May 15, 1924. G. H. Marsh, Clerk.

And thereafter and on the 9th day of January, 1925, there was duly filed in said Court an

AMENDED BILL OF EXCEPTIONS

in words and figures as follows, to-wit:

(Title)

Be it remembered, that in the November, 1923, term of the above entitled Court, to-wit: on the 11th day of January, 1924, the above entitled cause came on for trial in the above entitled Court before the Honorable Charles E. Wolverton, Judge of the said Court, and a jury duly empaneled and sworn to try the cause, plaintiff appearing by Mr. Allan Bynon and Mr. J. O. Stearns, Jr., Assistant United States Attorneys, and the defendant appearing in person and by Mr. Barnett H. Goldstein, his attorney, whereupon the following proceedings were thereupon had, to-wit:

Milton O. Nelson was called as a witness on behalf of the Government and being sworn, testified:

That he is an Editor of the "Portland Telegram" and from 1909 to 1915, and from 1920 to the date of the trial, has lived approximately two miles from the premises conducted by defendant, known as the Plantation Inn or Twelve Mile House; whereupon the following proceedings were had:

(Testimony of Milton O. Nelson)

Q. Now, I will ask you, Mr. Nelson, if you know the reputation of the Twelve Mile Road House or Plantation Inn, as to being a place where intoxicating liquor is commonly kept and dispensed?

COURT: General reputation in that community.

Mr. Stearns: Yes, that is the general reputation. That would be on or about the 10th day of May, 1923. That completes the question.

Mr. Goldstein: Now, at this time, if the Court please, I renew my objection, on the ground it is incompetent, irrelevant and immaterial, and further on the ground that the question is not properly framed as to determining the general reputation.

COURT: The objection is overruled.

Exception allowed.

A. Yes, sir.

Q. What is that reputation—good or bad?

A. Bad.

On cross-examination the following proceedings were had:

Q. Well, then, when you say his reputation in May, 1923, was bad, or rather reputation for selling liquor there, was it from anything you had learned in 1914, or 1915, or 1918, 1920, or 1921, or was it something you had learned about that time?

(Testimony of Milton O. Nelson)

A. It was common talk about there then, that he was running the house, and I knew what was going on there; that is, as from the neighbors, what the neighbors said.

Q. Were you in consultation with Mr. Christofferson, or some one in the sheriff's office, concerning this case?

A. No.

Q. At any time? Or Mr. Hurlburt?

A. You mean this case that is being tried now?

Q. Yes.

A. No, sir.

Q. Didn't you ever discuss with Mr. Hurlburt about this case?

A. Not this case.

Objected to.

COURT: I will sustain the objection.

Mr. Goldstein: I may have an exception.

Q. Is it not a fact that you urged the trial of Mr. Merrill at Gresham, before his neighbors?

Mr. Stearns: If your Honor please, I think that is also objectionable.

Mr. Goldstein: I want to show his interest.

COURT: I will sustain the objection.

Mr. Goldstein: May I have an exception to that. If I was permitted to examine the witness, I would expect the witness would testify

(Testimony of Milton O. Nelson)

that he had taken an active interest in the prosecution of this case, and also had recommended. . . .

COURT: Have you taken an interest in the prosecution of this case elsewhere than in this court?

A. No.

COURT: Well, that answers that.

Mr. Goldstein: That is all I wanted to know.

Q. Now, Mr. Nelson, how many editorials have you written about the . . .

COURT: That is objectionable now. I think we want to get to an end some time or other in this case.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Thereupon W. H. Nickell was called as a witness on behalf of the Government, and being sworn, testified:

That he was a waiter living in Portland, Oregon, and knew the defendant, whereupon the witness was asked the following questions:

Q. Did you ever work for Fred Merrill?

A. I did.

Q. Where was it you worked for him, Mr. Nickell?

A. Twelve Mile Roadhouse.

Q. When was it that you worked for Mr. Merrill, if you can remember?

(Testimony of W. H. Nickell)

A. I think it was in April.

Q. Of what year?

A. 1923.

* * * * *

Q. You say you worked in April. About how many days did you work altogether, Mr. Nickell?

A. Ten or twelve days.

Q. What did you work as at the Twelve Mile Roadhouse for Mr. Merrill?

A. Worked as a waiter.

* * * * *

Q. During the time you worked there, did parties come out during the night time and eat at his place?

A. Yes.

Whereupon the following proceedings were thereupon had:

Mr. Goldstein: Objected to as incompetent, irrelevant, and immaterial, has no connection or bearing whatsoever with the material offense in this case, which is alleged to have been committed on May 10th. This is, I understand, concerning his experience with Mr. Merrill three weeks or more prior to May 10th.

COURT: What time were you working there in April?

A. I believe it was in April, yes, sir.

COURT: The latter part of April?

(Testimony of W. H. Nickell)

A. Yes, it was about the middle or latter part of April, because I was working extra at the Waverley Golf Club at the same time, and I figured to go to work steadily at the Waverley Club the first of May.

COURT: You are trying to prove now instructions given by Merrill to him?

Mr. Bynon: Yes, your Honor; also that this particular witness saw Mr. Merrill dispense liquor there, and that liquor was handled there, that Mr. Merrill took part in it.

COURT: Objection overruled.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Q. You may state to this jury, Mr. Nickell, what instructions Mr. Merrill gave you concerning liquor, if parties should ask for liquor there.

A. Mr. Merrill instructed me to call for him.

Q. Did he say about what he would do?

A. He said that he might be able to send out and get it.

* * * * *

Q. Mr. Nickell, did you carry out those instructions?

A. I did.

Q. Now, can you recall an instance, or two

(Testimony of W. H. Nickell)

or three or more, where you did carry out those instructions?

A. I can.

Q. Just tell the jury of one of these.

Mr. Goldstein: This is subject to my objection, of course?

COURT: Yes.

Mr. Goldstein: And I may have an exception?

COURT: Yes.

Q. Go ahead.

A. The first bottle he sold was a bottle of cocktails. He called it cocktails, and sold it for \$7.50. The next bottle he sold he sold it for \$8.00. The party happened to be a friend of mine. He said, "Waiter, will you have a drink with me?". I said, "Yes."

Q. Did you take some of the liquor?

A. Yes.

COURT: I will say to counsel the Court is admitting this testimony on account that the defendant is charged with maintaining a nuisance.

Mr. Goldstein: I object to the introduction of this testimony. I want my objection to go to the introduction of the testimony even on that ground.

COURT: Yes, very well.

(Testimony of W. H. Nickell)

The witness was further examined and testified as follows:

Q. Now, Mr. Nickell, you say that the man to whom Mr. Merrill served a bottle for \$8.00 invited you to have a drink out of the bottle?

A. That is what I said exactly.

Q. Are you familiar with the taste and smell of intoxicating liquor?

A. I should be.

Q. You may state what it was that was in that bottle that you had a drink of.

A. Well, it would be very hard to tell what was in the bottle.

Q. Well, what was it?

A. Supposed to be cocktails. That is what he called it—Cocktails.

Q. I will ask you whether or not it was intoxicating liquor.

A. It was.

Q. Who delivered that bottle to the man that offered you a drink out of it?

A. Fred Merrill.

Thereafter and subject to the objection of defendant, the following questions were asked of and answers given by the witness:

Q. Now, I will ask you if you can recall another instance when the defendant Merrill sold a bottle of liquor out there in your presence.

A. He sold another bottle, I believe, for

(Testimony of W. H. Nickell)

\$10.00 to California tourists. He also sold at the same time a dollar's worth of oranges or something.

* * * * *

Q. Now, Mr. Nickell, so much for bottles. I will ask you, while you were out there working for Mr. Merrill, you can remember instances where Mr. Merrill sold intoxicating liquor over the bar to drink?

A. We had a case out there one night—

Q. I can't hear you.

A. We had a case out there one night where a man was addressed as Judge. I think there were six in the party, and the dinner was a dollar and a half apiece, I believe, and the check was \$44.00.

Ethel B. Johnson, called as a witness on behalf of the Government, was duly sworn and testified to the following effect: That she is at present matron of the Women's Protective Division of the City of Bend, Oregon, and held that position from the first of June, 1923; that for some time prior to the 10th day of May, 1923, she was engaged in volunteer work with the Welfare Bureau of the City of Portland, Oregon, under the direction of Miss Martha Randall, and that on the 10th day of May, 1923, at the request of Miss Randall and Thomas M. Hurlburt, Sheriff of Multnomah County, Oregon, she agreed to accompany Mr. A. B. Gates, a Federal

(Testimony of Ethel B. Johnson)

Prohibition Agent, and Miss Ruth Mead, a fellow welfare worker, in an investigation of roadhouses adjacent to the City of Portland, for the purpose of ascertaining whether violations of the National Prohibition Act were occurring in such roadhouses and for the further purpose of procuring evidence and reporting violations, if any were found to exist. That pursuant to the arrangement mentioned above she, in company with Mr. Gates and Miss Meade, entered a taxicab at the Imperial Hotel in Portland at about 11:30 on the evening of May 23rd, and that they were then driven to the Twelve Mile Roadhouse, the premises conducted by defendant Fred T. Merrill, arriving there probably a little after twelve o'clock; that while in the taxicab on the way to the Twelve Mile House, she and her companions carried on to some extent with the idea of impressing the taxicab driver that they were a party of rounders out for a good time and in order that the taxicab driver might not suspect their mission and perhaps make it impossible of fulfillment.

That after arriving at the Twelve Mile Roadhouse, she and her companions, Mr. Gates and Miss Meade, were served by Mr. Merrill over the bar of that establishment, with intoxicating liquor, for which Mr. Gates paid the defendant 50c per drink; that later on they had dinner at the Twelve Mile House and that during the course of the dinner they were served by the waiter with several drinks of in-

(Testimony of Ethel B. Johnson)

toxicating liquor, which the witness believed to be moonshine; that she tasted the drinks as they were served to her, but poured most of the liquor out when the waiter was not watching; that there were quite a number of other persons present during the evening, dancing and drinking and one man in the premises was so intoxicated that he fell down on the dance floor and that a woman entertainer, apparently under the influence of liquor, mounted the bar and sang for the entertainment of the crowd. That shortly before leaving, Mr. Gates purchased two bottles of liquor, one amber colored (moonshine), the other white (gin) at \$5.00 a bottle and that Mr. Merrill delivered those two bottles to witness, the same being wrapped in newspaper. That she and her companions then entered the taxicab and were driven to their respective homes, she retaining possession of the two bottles of liquor until the following morning when she turned them over to Miss Martha Randall, Superintendent of the Welfare Bureau of Portland.

That she saw persons other than members of her own party drinking over the bar at the Twelve Mile House on the night in question.

Upon cross-examination the witness testified that there was no relationship between her and the witness Gates, but that she and Miss Meade called him 'Father' to be as silly as the rest of them, in order to play the game; that no one told them to be

(Testimony of Ethel B. Johnson)

silly, but it was done to show that they were rounders, out for a good time, that she had never been out to any roadhouse, and that it was her first experience as a detective, that she knew neither Miss Meade nor Mr. Gates prior to the night of May 10th, 1923; that her instructions were to go out and "get evidence on this house, buy moonshine if we could;" That her services were voluntarily given without expectation of reward, but that she was paid \$50.00 by the sheriff for her services in investigating the different roadhouses, at the conclusion of the investigation; that they feigned a degree of intoxication on the way out and were laughing and talking, pretending that they were out for a good time.

Q. Did he, (Gates) tell you to smoke cigarettes?

A. No, and we didn't smoke them either.

Q. Did you attempt to smoke them?

A. We pretended to, yes

Q. You pretended to?

A. Yes.

Q. When did you pretend to smoke cigarettes?

A. Going out in the taxi.

Q. Who furnished the cigarettes?

A. Mr. Gates asked the driver for them.

Q. Who gave you the cigarettes?

A. The driver gave them to Mr. Gates.

(Testimony of Ethel B. Johnson)

Q. Who gave you the cigarettes?

A. Mr. Gates.

Q. What did he say to you when he handed you the cigarettes?

A. Didn't say nothing that I remember.

Q. Do you know what you were supposed to do?

A. Pretend to smoke them; pretend to be that kind of women.

Q. Pretend to be what kind of women?

A. Women who would go out at that time of night to carouse

Q. Do you mean pretend to be a bad woman?

A. No, not necessarily; but pretend to be one who would go out on a party.

Q. He didn't suggest that you should pretend in the cab, did he?

A. He didn't suggest it, no.

Q. How did you carry out the pretense of smoking?

A. Well, we tried to light them, and we bumped around in the taxi—held around in our hands a little while, finally threw them out the window.

Q. That was to impress the taxi driver?

A. It was.

That Gates was to be a cattle man, and they were to be girls out for a good time; that Gates went

(Testimony of Ethel B. Johnson)

into the bar-room at the defendant's place alone, and later took them in and ordered drinks; that the witness did not drink the first drink because she did not like it; that Miss Meade played the piano and the witness danced with everybody in the place, and mixed with them; that they left the place about three o'clock a. m.; that while there the witness tasted three or four, perhaps five, glasses, which amounts to about one full size drink, and had a chicken dinner; that Gates asked Merrill for two bottles, that they all pretended intoxication at defendant's place.

Thereupon, A. B. Gates was called as a witness for the government, and being sworn, testified that since May, 1923, he had been Deputy Sheriff of Multnomah County, and that prior to the 10th day of May, 1923, he was Federal Prohibition Agent with his office in Seattle, Washington; that he was sent here by Chief Jackson of the Seattle Prohibition Force; that he came here to investigate road-houses and through a deputy sheriff of Multnomah County, met Mrs. Ethel Johnson and Miss Ruth Meade, who were to be his companions in the investigation.

That on the evening of the 10th day of May, 1923, he met the ladies at the Imperial Hotel in the City of Portland, called a taxicab and drove to the Twelve Mile House; that he had no intoxicating

(Testimony of A. B. Gates)

liquor with him upon that occasion; that he had not had a drink of intoxicating liquor prior to going to the roadhouse, nor observed any liquor in the taxicab on the way out; that on arrival at the Twelve Mile House they went in and the witness went to where he noticed a bar and found the defendant Merrill behind it; that after some conversation with Merrill, the defendant served him with Scotch whiskey at a charge of 50 cents. The witness testified that on the way out to the Twelve Mile House and after arriving there he feigned, to a certain extent, intoxication to let defendant know that he was out for a good time so that he would not be detected while finding out whether he could buy liquor there. The witness testified that after he had purchased the first drink he bought four gin fizzes for himself and the two girls and the taxi driver and paid defendant 50 cents a drink therefor, during which time they ate dinner, were served with several rounds of drinks, which the ladies after tasting for the purposes of identification got rid of by pouring in their water glasses or coffee cups, and generally conducted themselves as guests of the place; that one of the guests of the place was very drunk, some of the others intoxicated, and that one lady, apparently intoxicated, danced and sang upon the bar; that upon application to the defendant, his companion, Mrs. Johnson, was given two bottles of whiskey at a price of \$5.00

(Testimony of A. B. Gates)

each; that they drove directly back to Portland and the witness being short of change, his companion, Mrs. Johnson, paid the taxi bill by check; that the witness retired about 4:15 a. m. and appeared at the sheriff's office at about 8:30 a. m., at which time he made a full report of his visit to defendant's place.

Upon cross-examination witness testified that he drinks only when it is necessary; that he has been a detective in the neighborhood of thirty years, working at other vocations in between times; that about four days after the raid his services were discontinued by the government and he was thereupon employed by the state as a deputy sheriff of Multnomah County; that prior to his connection with the Prohibition Force, he was employed for two years by the Anti-Saloon League as an investigator of violations of the liquor law and operated as such in various cities in the State of Oregon.

The witness further testified that he was a cook and steward by trade; that he had been variously employed as a detective by the Anti-Saloon League, and also by Theil Detective Agency, and also as deputy sheriff of Multnomah County, and as a prohibition agent for the government; that he had no employment with the sheriff at the time of the raid on the Twelve Mile House but was receiving instructions when starting out on these investigations from Hurlburt (the sheriff) and Christoffersen

(Testimony of A. B. Gates)

(chief deputy sheriff); that he received no instructions from the sheriff's office but that the two women (Mrs. Johnson and Miss Meade) were assigned to him by the sheriff's office; that on May 10th, the witness has a conversation with someone in the sheriff's employ with respect to the two women that were to go with him and was told to investigate roadhouses, whereupon the following proceedings were had:

Q. Now, were you employed by the sheriff's office prior to the time you undertook these investigations of these roadhouses?

A. On several occasions, yes, sir.

Q. What were you employed as by the sheriff?

A. As deputy.

Q. For what purpose?

A. For making liquor investigation.

Q. Liquor investigations, under cover?

A. Yes, sir.

Q. Now, when you first discussed with the sheriff about these investigations, what was the extent of your employment?

A. I was then Federal Prohibition Agent.

Q. I am asking you, please, to state what was the extent of your employment with the Sheriff's office?

A. Oh, with the sheriff. Well, I had no employment with the sheriff at that time.

(Testimony of A. B. Gates)

Q. Under whose command were you receiving instructions when you started out on these investigations?

A. Why, from Sheriff Hurlburt and Mr. Christoffersen.

Q. All right. What information or what instructions did you receive from the sheriff's office when you started out on these investigations?

A. They didn't give me any instructions.

Q. How did it happen that two women were assigned to you?

A. Why, they made that arrangement for me.

Q. Wasn't that discussed with the sheriff's office?

A. They told me they would furnish me two women, yes, sir.

Q. Well, then, there was something discussed between you and the sheriff's office as to how the investigations were to be handled?

A. No, sir.

COURT: I don't think you need go into that. It is enough that this man was employed by the sheriff to do detective work and was assigned to this matter.

Mr. Goldstein: I want to know what the employment was supposed to contemplate—whether it was supposed to contemplate taking

(Testimony of A. B. Gates)

the women out with him, or what control he had over the women.

COURT: He has already said they furnished him these two women, and I think that is enough.

Mr. Goldstein: For the purpose of the record, I will ask you this question, Mr. Gates:

Q. On May 10th, prior to going out to Mr. Merrill's place, you had a conversation with Mr. Hurlburt or Mr. Christoffersen or someone in the sheriff's employ, with respect to the two women that you were to take out with you, did you not?

A. Yes, sir.

Q. Now, at that time were you informed as to what roadhouses you were to investigate?

A. They told me to investigate the roadhouses, yes, sir.

Q. They told you to investigate eight roadhouses, did they not?

A. No, they did not.

Q. How many roadhouses were you to investigate?

A. They didn't mention the number of roadhouses.

Q. How many roadhouses did you investigate?

A. I investigated eight of them.

Q. Of all these eight roadhouses you in-

(Testimony of A. B. Gates)

investigated pursuant to that instruction, you went out with these two ladies?

COURT: He didn't say eight roadhouses. He has already explained that. He said he went out to investigate roadhouses. I thought he said eight. Pardon me. How many roadhouses did you investigate?

Mr. Bynon: I object to this. We are still trying to try this one case. What happened at other times subsequent to this has no bearing upon the guilt of the accused.

COURT: I think you have gone far enough with that.

Mr. Goldstein: May I at least call your Honor's attention to what I have to present in the way of legal presentation of the authorities with respect to this question, because this man, as your Honor can readily recognize, is an interested witness. Mr. Gates is the prime witness in this case with respect to these counts in the indictment. He went out there for the purpose of securing, if he possibly could, violation of the liquor law. He is the interested witness for the government; and his testimony would have to be scrutinized with some particular care by the jury. Consequently his ascertainment, his power of perception, his memory, his motive, his animus, all these are matters that are vitally important for consideration of the jury.

(Testimony of A. B. Gates)

Now, I am making this statement with some authority, and I merely would like to call your Honor's attention, then your Honor may pass on it, because I want the record to show the purpose of the inquiry and the authority which I have to present—which I think it is only fair to your Honor that I present. I admit at the last trial I had not gone into these authorities sufficiently to make a proper presentation to the court. Probably it was my fault that Judge Bean would not permit me to go into these questions. Probably it was because of the nature of the question, the form of the question I propounded; probably it was because the direct examination had not been broad enough to permit me to go into the cross-examination. There may have been a thousand and one reasons why I should not have asked the witness those questions. But since that time I have gone into that and I intend also, if the court will bear with me, to connect this testimony with positive proof by one of the government's witnesses that these deliberations and arrangements had been made prior to going out to Mr. Merrill's place, which contemplated doing certain things which are allied with our theory of the defense. As I have already stated in my opening statement, I am going to prove by the defense that this man started out with liquor toward the place. He

(Testimony of A. B. Gates)

denies he took liquor out there. I want to show an arrangement and agreement that he had with the sheriff's office, prior to going out there, in certain cases for the use of liquor. Your Honor may be familiar with the rule of admission of testimony in a criminal case as stated in *State vs. Mah Jim*, 13 Ore. 235. Also 40 Cyc. in the interest of truth and justice, it is usual to allow considerable latitude in the examination of an adverse witness, especially where the testimony is hostile, etc.

I do feel, honestly and conscienciously, that I ought to have a right to show by this witness that not more than two days afterwards, on the same investigation of similar roadhouses, he went out with liquor to a certain place, and that he consumed liquor on the way out there, and he drank the liquor in that place, and left the empty bottle there with some of the contents, and went back and swore out a warrant against the man for the only liquor there, that had been brought by himself.

That I can prove, if I am permitted.

COURT: You will not be permitted to prove that.

Mr. Goldstein: So as to make that clear, I will ask him this question: During the course of his negotiations with the sheriff prior to going out to Mr. Merrill's place, if at that time

(Testimony of A. B. Gates)

there had not been some discussion or understanding as to the methods that he was to use in his investigation of these roadhouses.

COURT: You were instructed to make investigations of roadhouses?

A. Yes, sir.

COURT: And you went there. You were left to your own course as to what you should do?

A. Yes, sir; they didn't tell me what to do. They left that up to me.

Mr. Goldstein: I propose, if the court please, to discredit that.

COURT: Well, you will have to prove it from your own resources then.

Mr. Goldstein: I can prove that by one of their witnesses. As long as he is on the stand here, I wanted to go into that.

COURT: That is as far as you can go with this witness.

Mr. Goldstein: May I, for the purpose of the record, may I bring the stenographer aside to explain what I hope to prove?

COURT: I think I understand you fully.

Mr. Goldstein: I mean, for the purposes of the record, may I bring the court reporter aside and have the record show what I would have been permitted to prove if the court had allowed me?

(Testimony of A. B. Gates)

COURT: Not in this kind of a case. You will have to ask your questions, and then the court will determine whether it is proper or not. And then, if the court overrules it, you can state what you wish to prove.

Mr. Goldstein: I am taking exception to your Honor's ruling as to the refusal to allow me to proceed with the inquiry.

COURT: You ask your question now, and then the court will rule upon it, and then you can make your statement of what you expect to prove as to get it into the record.

Q. I will ask you if it is not a fact that prior to going out to Mr. Merrill's place you had a general discussion at which Mrs. Johnson, Miss Meade and the sheriff's office or someone else was present, concerning the methods that you were to use in investigating these road-houses.

Mr. Stearns: Now, if your Honor please, that question is objected to because the court has already ruled on it a number of times; and moreover, the witness has answered that question in the negative not only once but two or three times.

COURT: The objection will be sustained. Now you may state what you want to get into the record.

Mr. Goldstein: I take an exception. And

(Testimony of A. B. Gates)

will expect to prove, if permitted to examine this witness, I would expect to prove that an understanding and agreement was affected.

COURT: Do you expect this witness to state that?

Mr. Goldstein: I expect to discredit him.

COURT: You must state what you expect this witness to state. You cannot go out and state what you expect to prove by somebody else.

Mr. Goldstein: Maybe I will do it better in another way. I take exception to your Honor's ruling in not permitting me to ask that question.

Whereupon witness was asked the following question:

“Is it not a fact that, during the course of your investigation of these roadhouses, you did take out liquor with you which you used as the basis for swearing out a warrant of arrest against a party in whose place you brought the liquor?”

To which question objection was made and sustained and exception allowed.

Whereupon the following question was propounded to the witness:

“Now, I will ask you, Mr. Gates, if at any time prior to May 10th in making your investigations, you had occasion to use liquor as a means

(Testimony of A. B. Gates)

of inducing violations of law?"

To which question objection was made and sustained and an exception allowed.

Whereupon the following proceedings were had:

Q. Now, Mr. Gates, had you at any time been under the influence of liquor in making liquor investigations prior to this time?

A. You ask me if I have been under the influence of liquor?

Q. Yes.

A. No, sir.

Q. Had you at all times—

COURT: Is that for impeachment matter?

Mr. Goldstein: Yes.

COURT: I think the court will rule that out. You are going far afield in this matter. It will take all winter to try this case.

Mr. Goldstein: No, it won't. It is going to be very short. If I can only get the answers, it won't take very long. It takes much longer to object to these things than it does to get the information.

Q. Now, Mr. Gates, when you started out on May 10th with these two ladies, had you had an opportunity to discuss with those two ladies in company together anything they were to do either in the cab or at the Twelve Mile House?

A. No, sir. I left them at their own resources.

(Testimony of A. B. Gates)

Q. How is that?

A. No, sir.

Q. By that you mean you didn't meet the two of them together at one time, or you met them individually?

A. I mean I didn't discuss with them and tell them what they had to do. I did not.

Q. Did you at that time know that they were women that had never been out on one of these trips before?

A. No, sir.

Q. You were under the impression that they had been on trips of this kind before?

A. No, I can't say. I didn't make any impression concerning that.

Q. When you saw Miss Meade in the afternoon at her studio or at her office where she was employed in some theatrical agency, what did you discuss with her?

A. I was taken up there by Mr. Christoffersen.

Q. Please answer the question. What did you discuss with her?

A. Why, we didn't discuss anything.

Q. You said nothing at all to her?

A. I am just trying to tell you, if you will give me just half a chance. I was introduced to her and was told that she was the lady that was to go with me that evening.

(Testimony of A. B. Gates)

Q. What did you discuss with her?

A. Why, we didn't discuss anything than that she was to go to the roadhouses with me to make an investigation.

Q. You did discuss that with her then?

A. Yes, that is all, to let her know what I wanted her for.

Q. What did you say to her?

A. That is all, I have just stated.

Q. What?

A. That she was to go along, accompany me to the roadhouses.

Q. What roadhouses?

A. Why, the ones that I was going to investigate.

Q. You knew then the roadhouses you were to investigate?

A. Well, I knew of the Twelve Mile House.

Q. You knew the roadhouses you then were to investigate. Yes or no.

A. Yes.

Q. Now, what did you say to her at that time she was to do?

A. Not a thing.

Q. What did she ask you as to what she was to do?

A. She didn't ask me anything.

Q. Was anything said about her having to drink liquor?

(Testimony of A. B. Gates)

A. No, sir.

Q. Well, did you know at that time that these ladies were to go out there with a view of trying to get a drink, if they could.

A. Certainly I knew it.

Q. Did you know whether or not the women had, prior to that time, never taken a drink before?

A. I didn't know.

Q. Did you ask them?

A. No, sir.

Q. Did you know whether these girls had never been to these roadhouses before?

A. No, sir.

Q. Did you ask them?

A. No, sir.

Q. Did you know whether these girls were accustomed to smoking?

A. No, sir.

Q. Did you ask them?

A. No, sir.

Q. Did they ask you anything at all?

A. No, sir.

Q. Did you tell them anything at all?

A. No, sir.

Q. And all you said that afternoon when you went down there with the sheriff, Christofersen, was that she was to go with you to these roadhouses?

(Testimony of A. B. Gates)

A. Yes, sir.

Q. And that was all the conversation you had?

A. Yes, sir.

Q. All right. Then when you met Mrs. Johnson outside the sheriff's office in the automobile, what did you say to her?

A. Well, Mr. Christoffersen introduced me.

Q. What did you say to her?

A. Well, I will be away ahead of my story.

Q. I don't want the entire story, unless counsel wants it.

A. I didn't say anything to her.

Q. Did she say anything to you?

A. No, sir.

Q. So you never addressed one word to her?

A. Well, Mr. Christoffersen—

Q. Did you ever?

Mr. Goldstein: I understand. I simply asked him. Did you say anything to her, her personally. Let me repeat it again. Mr. Gates, take your time, think it over. What, if anything, did you say to Mrs. Johnson outside the sheriff's office, when you were introduced to her by Mr. Christoffersen?

A. Well, she was a perfect stranger to me at that time. I was introduced to Mrs. Johnson by Mr. Christoffersen. Mr. Christoffersen says, "This is the lady that is going to accompany

(Testimony of A. B. Gates)

you to the roadhouse tonight.” And he says, “You can set the time that you want her to meet you, and where.”

COURT: Then what did you say to her?

A. I told her to meet me at the Imperial Hotel somewhere around eleven o'clock. That was all that was said to her.

Q. You said absolutely nothing else to her?

A. No, sir.

Q. Did you tell her what she was to wear, or what she was to do?

A. No, sir.

Q. Did Mr. Christoffersen tell her in your presence?

A. No, sir, not that I know of.

Q. Now, at what time did you meet these two girls?

A. Oh, approximately eleven-thirty. One was there a little ahead of the other.

Q. Where did you meet them?

A. I met them at the Imperial Hotel.

Q. Where were they—in the lobby?

A. Yes, sir, in the ladies' rest room.

Q. Did you have an opportunity to talk with them there awaiting the cab?

A. I had an opportunity to talk to them, but we didn't talk about the case any.

Q. I have not come to that yet. You had the opportunity to talk with them, and you said nothing to them?

(Testimony of A. B. Gates)

A. I told them we was going out to the Twelve Mile House, and was going to see if there was any liquor violations there.

Q. You told them then for the first time that you were going to see if there were any liquor violations there?

A. Yes, sir.

Q. Did you tell them to bring any liquor back with them?

A. No, sir.

Q. You never told that to Mrs. Johnson?

A. Not at that time.

Q. When did you tell her, if at any time?

A. Not until we got into the roadhouse and was ready to come away.

Q. Now, then, you never said to Mrs. Johnson at any time until you got into the roadhouse about the necessity of her taking any liquor away from that place? Is that true or not true?

A. I don't remember whether I ever told her it was necessary or not. I know we was going to go out there and bring some back if possible, that would be sold to us.

Q. That is, you knew you were going to do that. I am trying to find out whether you at any time prior to entering into the roadhouse ever told Mrs. Johnson or Miss Meade about taking liquor from the place.

(Testimony of A. B. Gates)

A. No, I don't believe I did.

Q. You don't believe you did?

A. No, sir.

Q. Did they at any time prior to coming into the roadhouse ask you about the necessity of taking liquor from the place?

A. No, sir; not that I know of.

Q. They did not. Did you tell them prior to entering the taxicab that it was necessary for them to feign intoxication?

A. No, sir.

Q. Then it was a matter of surprise to you when they feigned intoxication in the taxicab?

A. No, it didn't surprise me.

Q. You stated in your direct examination, I believe, you feigned intoxication before you got in the taxicab.

A. Yes, when I stepped out on the sidewalk and went to the cab.

Q. By feigning intoxication on the sidewalk before getting into the cab you mean by staggering?

A. No, I didn't stagger very much; no, sir.

Q. What did you do?

A. Well, same as anybody that would—

Q. I don't know what anybody else would do. I am asking you about what you did.

Mr. Stearns: He is answering the question. Let him answer, please.

(Testimony of A. B. Gates)

A. When I went and hired the cab to drive up outside, I walked up to the driver and asked him about the chances of getting that cab, and if it was engaged. I told him I had a party that wanted to go out—

Q. I asked you what you did about feigning intoxication on the sidewalk before getting into the cab?

A. I kind of made him think, believe I had been drinking, something like that.

Q. What did you do on the sidewalk, prior to getting into the cab?

A. I didn't do very much of anything, except walk right out and walk back in, got the ladies after I had the cab engaged.

Q. You said you acted so as to give the impression that you were drunk or under the influence of drink.

A. Yes, sir. I stood in front of the driver, I might sway a little bit, and then turned around and walked away.

Q. You swayed a little bit?

A. Yes, sir.

Q. Instead of staggering, you swayed?

A. I had to be careful about staggering around in a crowd like that in front of the hotel.

Q. Did these girls also sway in getting into the cab?

(Testimony of A. B. Gates)

A. Not that I know of, or noticed.

Q. When you got into the cab you continued your pretense of intoxication?

A. Yes, to a certain extent.

Q. Just explain what you mean, to a certain extent.

* * * * *

A. Well, it would not really be necessary to feign very much in the cab.

Mr. Goldstein: I submit, if the court please, the witness should not argue with me.

COURT: Answer the question. Then make your explanation.

A. No, I didn't very much of any kind.

Q. What did you do?

A. I sat down in the cab, and sat there same as anyone else would, and talked to the girls. I certainly did, yes.

Q. You said you feigned intoxication to a little extent. Now that is not any intoxication—talking to the girls. Did you talk loud in a boisterous manner?

A. No, sir.

Q. Well, then, how did you feign intoxication?

A. Well, that is the only way I did, if that meant anything.

Q. When did you tell him you were a cattle man and from Eastern Oregon?

A. Tell who?

Q. The driver.

(Testimony of A. B. Gates)

A. I don't remember I ever told him, unless he heard it into Merrill's place. I told Mr. Merrill.

Q. You didn't tell it at all on the way out?

A. No, sir; I didn't engage in no conversation.

Q. During the ride out there, didn't you talk to the girls loud, so that he might hear as to what your plans were?

A. No, I didn't talk—ordinary tone.

Q. Then you were not feigning intoxication at all in the cab from what you state now?

A. Well, as I said, it would not be necessary for me, because I was in the back seat there, and why should I perform when it was dark in the car, and the driver was facing the front of the road, so he could see where he was driving to? He would not have seen anything anyway.

Q. In your examination you said you feigned intoxication for atmosphere. When did you begin to do that?

A. When I went out and hired the cab.

Q. That was atmosphere for what?

A. So I would not be detected; so that he would think that I wasn't no spotter or anything like that, or a man going out looking for no information in regards to the roadhouses.

Q. You wanted him not to think you were a spotter, which you were.

(Testimony of A. B. Gates)

Mr. Stearns: If your Honor please—

COURT: I will sustain the same objections to that question.

Mr. Goldstein: Save an exception.

Q. When you got to the Twelve Mile House did you all get out together?

A. Yes, sir.

Q. Isn't it a fact that the driver got there first and opened the door, and then called you people?

A. No, sir.

Q. That is not a fact?

A. No, sir.

Q. Now, when you got in, you say you immediately went into the bar room?

A. No, sir.

Q. What did you do?

A. We entered into the reception room as we went in, and I asked for a private dining room.

Q. For what?

A. For to have something to eat.

Q. Chicken dinners?

A. Yes, sir.

Q. You knew they made a specialty of chicken dinners out there?

Mr. Bynon: If your Honor please, that question has been asked three times now.

Court: You may answer it again.

(Testimony of A. B. Gates)

A. Yes, sir.

Q. Now, after you got in, you said you first went into the reception room?

A. The reception room.

Q. Then you went into the bar room yourself? Is that right?

A. I went into the dining room first with my party, in a private dining room.

Q. Then what?

A. Then I happened to look around the room and seen a door open there, and I seen a bar through the door. I said, "I see something. I am going out." And I went out and saw Mr. Merrill behind the bar.

Q. Was anybody there at that time?

A. There might have been somebody.

Q. I am asking you, please, was there anybody there?

A. There was some other parties in the room, yes, sir.

Q. Did you see another taxi driver there?

A. There might have been another driver there.

Q. Didn't you, as soon as you arrived at the place, take out a bottle from your pocket and flourish it in the air?

A. No, sir.

Q. You didn't do that?

A. No, sir.

(Testimony of A. B. Gates)

Q. You might have done it on other occasions?

Objected to.

COURT: I have already ruled on that.

Mr. Goldstein: I will ask him the question, and then, please, may I take an exception in the record, to show the purpose of these questions and to show the methods employed by him along those similar lines I am asking him about?

COURT: At the other places?

Mr. Goldstein: In connection with that particular employment.

COURT: The court will not permit you to ask those questions. I have ruled on that once or twice. I tried to make myself plain.

Mr. Goldstein: I understand, if the court please. I want the record to show.

COURT: You will not be permitted in this case to go out and examine this witness as to other roadhouses, and what he did at those places. I might as well put a stop to that right now.

Mr. Goldstein: I am not going to pursue that any further as to this witness, only as it might affect his credibility as a witness. That is the only purpose, for the purpose of showing his motive and interest. May I have an exception to your Honor's ruling?

COURT: You may have your exception.

(Testimony of A. B. Gates)

You are always entitled to that. You may always have it in this court.

Q. Now, when you asked him for a drink, was anybody present?

A. There were others around in the room, yes, sir.

Q. Do you know who they were?

A. No, sir.

Q. Did you make any effort to find out?

A. No, sir.

Q. You made no effort to find out?

A. No, sir.

Q. When you went into that room, did you stagger?

A. No.

Q. Did you sway?

A. I might have took an extra step or so, and kind of move around as if I had had a drink or two.

Q. Did you see any indication of any liquor being drunk in that room when you came in?

A. No, sir.

Q. Was there any liquor being served so far as you could see in that room when you first came in?

A. No, sir.

Q. And then you going in there and taking an extra step, as you said, started out with

(Testimony of A. B. Gates)

the same question, "Can I get anything to drink here?"

A. No, sir, I didn't say that.

Q. What did you say?

A. I said, "How is chances to get a drink of Scotch whiskey?"

Q. Mr. Merrill said there was no chance?

A. He said, "I don't think so."

Q. Then it was you began telling him a story about your being a cattle man?

A. He commenced asking me where I was from and who I was.

Q. Did you flash a roll of bills?

A. No, sir.

Q. Did you tell him about the cattle that you had just brought into town?

A. No, I don't remember about telling him of bringing any cattle in.

Q. Well, did you say you had just sold a load, or something of that kind?

A. No, I told him I was a cattle man, after he asked me who I was and where I was from. I told him I was from Eastern Oregon.

Q. Did you say something about being tired of stockyard whiskey?

A. No, sir.

Q. Never mentioned the term?

A. No, sir.

Q. Now, was there anything said about

(Testimony of A. B. Gates)

Miss Meade playing the piano to entertain the guests?

A. No, sir.

Q. Was there anything said about Mrs. Johnson dancing with the guests?

A. No, sir.

Q. The fact is, Miss Meade did play the piano?

A. She did.

Q. Mrs. Johnson did dance with the guests?

A. Yes, sir.

Q. And you carried on rather boisterously?

A. No, sir.

Q. What did you do?

A. Why, I danced and talked to other parties around there, yes, sir.

Q. Didn't you carry on your pretense of intoxication?

A. To a certain extent, yes, but never stepped out of my way, or out of my place.

Q. Did you offer drinks to women folks there?

A. I didn't offer anybody a drink.

Q. Didn't you offer anybody a drink?

A. In what way? I would like to know what way do you mean?

Q. I thought you stated in your direct examination you invited some other people there to have drinks?

(Testimony of A. B. Gates)

A. I did after they got acquainted with us. When I stepped up to the bar to buy a drink these other parties were there. I asked them to have a drink with us.

Q. I asked you a few seconds ago, did you offer any women folks a drink?

A. I didn't offer them in particular. I thought maybe you meant that I had a glass in my hand and offered them. I asked that party if they would have a drink.

Q. Were there women folks in the party?

A. There was two women folks in that party.

Q. You offered the women folks a drink?

A. I asked the gentleman if his party would have a drink. I didn't ask the women folks direct, no sir.

Q. You knew the women were drinking in that party?

A. Yes, sir.

Q. You knew your own women were drinking?

A. I had been buying drinks for them, yes.

Q. You came out there for the purpose of drinking, and taking drinks away from there?

A. Yes.

Q. You said that the first time drink was offered, Mrs. Johnson and Miss Meade refused to take any?

(Testimony of A. B. Gates)

A. They refused to take any? No, they didn't refuse to take it.

Q. Didn't you state yesterday that Mrs. Johnson refused to take a drink when it was offered to her because she claimed it was too fuzzy, it was too mixed, or something of that kind? Didn't you state that yesterday afternoon?

A. That mixed drink, yes sir.

Q. Didn't you state that yesterday afternoon that Mrs. Johnson refused to drink because it was fuzzy, or it was too mixed—yes or no?

A. It was too much of a mixed drink, she didn't want it.

Q. Will you answer that question, yes or no?

A. I am answering it, yes, sir.

Q. Then counsel is mistaken when he says you didn't say that?

A. You get me tangled up so it is hard for me to answer that question for you.

Q. Now, Mr. Gates, when was it you suggested to Mrs. Johnson that she should ask for some liquor to take home?

A. I don't remember ever telling her that—to ask for liquor.

Q. When was it that you discussed with her about asking, if at any time?

(Testimony of A. B. Gates)

A. I don't remember discussing it.

Q. So you never had any conversation, then, with Mrs. Johnson or she with you about asking to take any liquor home?

A. I had told her that I was going to try to get some liquor to take home with me, yes.

Q. When did you discuss that with her?

A. Why, I don't just remember what time it was. It was through the course of the evening. It was before we was ready to go home—something like that.

Q. And then Mrs. Johnson had nothing to do with the two bottles that you ordered from Mr. Merrill?

A. I had ordered them.

Q. Please answer the question. Then Mrs. Johnson had nothing to do with the ordering of the two bottles from Mr. Merrill?

COURT: He was over that yesterday, under your cross-examination. I don't think you need to take time with it.

Q. Did you have your chicken dinner?

A. Yes, sir.

Q. How much did you pay for the dinner?

A. \$3.00 a plate.

Q. \$3.00 a plate?

A. Yes, sir.

Q. Do you want the jury to understand that

(Testimony of A. B. Gates)

Mr. Merrill charges three dollars a plate for chicken dinners?

Mr. Stearns: It is not what he wants the jury to understand. It is what is the fact.

COURT: He has answered the question that they paid \$3.00 a plate for it. I don't think it is necessary to inquire as to what they generally charge for these dinners.

Mr. Goldstein: You say I cannot ask him if he knows what the general charge is for a chicken dinner?

COURT: No.

Mr. Goldstein: Can I ask him why it was he paid it without protest, if he knew what the general charge would be for a chicken dinner?

COURT: No, you cannot ask him that.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: You may have your exception.

Q. Why did you invite the taxi driver in with you?

A. Well, I knew we would be in there for some time, and I didn't care to have the man stand outside. Thinking he might be hungry along about midnight, so for courtesy I asked him in.

Q. Did you offer him any drinks?

A. I offered him a gin fizz.

Q. Did he drink any?

(Testimony of A. B. Gates)

A. I believe he did, yes.

Q. Was he under the influence when he was driving you home?

A. No, sir.

Q. Now, how long did you say you remained there?

A. Oh, somewhere around three o'clock.

Q. And you don't know what time you arrived in town?

A. Yes, it was something after three o'clock—three-thirty; somewhere around there.

COURT: You have been all over that, Mr. Goldstein.

Q. Now, you went out there for the sole purpose of securing a liquor violation, if you could? Is that right?

Mr. Stearns: If your Honor please, he was not out there for the purpose of securing a liquor violation. But he was out there for the purpose of determining whether the liquor law was being violated there, and he so testified.

COURT: Yes, that has been testified to.

Q. When Mrs. Johnson and Miss Meade wouldn't take the first drink, did you admonish them that their business there was to drink?

A. No, sir.

Q. Did you ask them then if they did drink?

A. No, sir.

(Testimony of A. B. Gates)

Q. You were not surprised then about their not drinking?

A. No.

Q. Now, when was it that the girls began calling you father?

A. I don't know.

Q. Did they call you father?

A. I believe Mrs. Johnson once or twice called me father. As far as I was concerned, I didn't pay any attention to that. That is natural—girls might do that any time when they are out.

Q. Girls might do that any time when they are out?

A. Yes, any party. I don't mean particularly my party. But any party that might go out for a good time, anything like that, going out for a good time, any such things as that, they might call me father, such as that.

Q. Now, you were the man that swore out the warrant for Mr. Merrill's arrest? Is that right?

A. Yes, sir.

Q. You were the man that made the affidavit for the search warrant that was issued?

A. Yes, sir.

Q. You were the man that claims he never takes a drink outside of business?

Mr. Stearns: If you Honor please, that is argumentative,

(Testimony of A. B. Gates)

COURT: What is your answer to that?

A. Yes, sir.

Q. Now, Mr. Gates, you have been on liquor investigations for how many years?

COURT: You have been all over that.

Mr. Goldstein: Just one point.

COURT: I think we better put a stop to that now, because he has been over that.

Mr. Goldstein: He says he never took a drink outside of business. Now, I want to find out—

COURT: You have been all over that question. There is no use taking up further time of this court with it.

Mr. Goldstein: May I ask one question?

COURT: You may ask one question to get it into the record.

Q. On the very first time you went out on a liquor investigation, stating that you had never taken a drink except on business, how did you at that time know the difference between the various kinds of liquor, without ever having had occasion to drink it except on business?

Mr. Stearns: If your Honor please, that question is objected to as incompetent.

Objection sustained.

Mr. Goldstein: May I have an exception?

Court: Yes.

(Testimony of A. B. Gates)

Q. Under what different assumed names did you operate?

A. Johnson.

Q. Did you ever go under an assumed name, by the name of Coffey?

A. No, sir.

Q. Isn't it a fact that that was the name you went under at the Imperial Hotel?

A. No, sir.

Q. And signed checks under that name?

A. No, sir. Furthermore, I never stopped at the Imperial Hotel in all my life, that is to register there.

Q. Well, I will ask you if you are not the same man that registered at the Imperial Hotel, room 509, October 23, 1923, under the name of C. C. Coffey, and you were ejected from that house?

Mr. Stearns: That question, if your Honor please, would be objectionable, because it occurred since the date of the offenses in question. However, I don't particularly object to the witness answering it.

A. No, sir, I never have, because I have never registered in that hotel.

Q. Under that assumed name?

A. Or any other name.

Q. And you were ejected from that hotel?

COURT: What time does that refer to?

(Testimony of A. B. Gates)

Mr. Goldstein: October 23, 1923.

COURT: After this transaction?

Mr. Goldstein: Yes.

COURT: The objection will be sustained.

Mr. Goldstein: May I have an exception?

I think that is all.

Thereupon, Miss Ruth Meade was called as a witness for plaintiff and after being sworn, testified that she was an organist and was part owner of the Juhasz Amusement Co., playing at moving picture houses in Portland, Oregon; that she was acquainted with Miss Martha Randall, matron of the Women's Protective Division, and sometimes voluntarily assisted her in her work, and that on the 10th day of May, 1923, she agreed with Miss Randall to accompany A. B. Gates and Mrs. Ethel Johnson, for the purpose of finding out whether certain roadhouses were violating the prohibition law; that they met Mrs. Johnson at the Imperial Hotel on the evening of the same day, and went in a taxicab to the Twelve Mile House. Witness testified that the driver of the taxi was on the left hand side, that she sat immediately behind him and that the window in front of her and between her and the taxi driver was closed and the one on the other side open. That she was in a position to know that there was no liquor in the taxicab and that none of the party had been drinking.

On arriving at the Twelve Mile House they were

(Testimony of Miss Ruth Meade)

met by a waiter and relieved of their wraps and went into the bar and were served with fuzzy drinks called gin fizzes by Mr. Merrill, which they did not drink; that the witness played the piano, ate a chicken dinner, was served with liquor and Mr. Gates bought drinks for the crowd. That on leaving, they purchased two bottles of liquor from Merrill and brought it with them.

On cross-examination the following proceedings were had:

A. Miss Meade, did you see with your own eyes these two bottles prior to seeing them in Miss Randall's office?

A. I saw them in the taxi.

Q. Were they open?

A. No, they were not.

Q. They were wrapped up in newspaper?

A. Yes, sir, they were.

Q. Well, then, how can you testify that you saw those two bottles in the taxi, when they were wrapped up?

A. Because I had taken Miss Randall's and Mr. Gates' word that they were the same bottles.

Q. How?

A. I know the two bottles that were put into our taxi.

Q. Miss Meade, you didn't have possession of those two bottles, did you?

(Testimony of Miss Ruth Meade)

A. I didn't, no, sir.

Q. They were wrapped in a newspaper?

A. They were.

Q. And they were taken by Mrs. Johnson.

A. Yes.

Q. And it was she who brought them to Miss Randall's, if she brought any liquor at all?

A. She did.

Q. Now, you didn't see those two bottles with your own eyes?

A. I knew they were buying them to take.

Q. Please answer—did you see those two bottles with your own eyes?

A. Unwrapped? Did I see them unwrapped or wrapped?

Q. Could you see them through the newspaper?

A. Well, I knew what they were.

Q. Well, could you see them through the newspaper?

A. No, I could not.

Q. Were you feigning intoxication, too?

A. Partly, yes.

Q. And how—to what extent?

A. Well, I mingled with the people that were there.

Q. How?

A. I mingled with the people that were there.

(Testimony of Miss Ruth Meade)

Q. Is that what you call feigning intoxication—mingling?

A. Well, I was jolly.

Q. Well, how jolly?

A. I don't know how jolly. I was laughing and talking.

Q. Is that feigning intoxication—laughing?

A. I wasn't feigning drunkenness, if that is what you mean.

Q. Did you feign intoxication? Did you or did you not?

A. Well, to a certain extent. I didn't feign drunkenness.

Q. What do you mean by intoxication? Don't you mean by that drunkenness?

A. I do to a certain extent, yes.

Q. Did you or did you not feign intoxication?

A. Partly, yes.

Q. Partly—what do you mean by that?

A. I mean that I was laughing and talking.

Q. Why were you playing the piano?

A. Well, that to me was natural, and I had to do something.

Q. Well, isn't it a fact that you testified at the last trial that you played for atmosphere?

A. It is, I believe.

Q. Well, did you or did you not so testify?

(Testimony of Miss Ruth Meade)

A. I believe I did, yes.

Q. Well, then, if you played for atmosphere, you played for a purpose, did you not?

A. I did.

Q. Now, then, if you played for a purpose, what was that purpose?

A. I was out there to get evidence, if the law was being violated, and that was my purpose.

Q. What was your purpose in playing the piano?

Mr. Stearns: If your Honor please, she has already testified what her purpose was.

COURT: Answer the question.

A. My purpose was, it was as easy, if not easier, for me to play the piano, as it was to dance.

Q. But you testified that you played for atmosphere, which is a little different from playing because it is easier to play, and you played for a purpose. Now, why did you play for a purpose?

A. Well, I played for a purpose, because playing the piano gave the atmosphere, or gave the idea that I was jolly.

Q. That is it? Well now, how long did you play during the course of the evening?

A. I don't know how long I played. Perhaps half of the time.

(Testimony of Miss Ruth Meade)

Q. Half of the time. And as a matter of fact you are an entertainer?

A. No, I am not.

Q. Don't you go out with the Juhasz Amusement Company to play for their theatrical acts?

A. I play for their vaudeville acts.

Q. You are then connected with some vaudeville association?

A. No, sir. I happen to own part of that company.

Q. But you play with their acts?

A. I merely accompany the acts as accompanist.

Q. But you go out with their acts?

A. I do, if it is necessary.

Q. So when you say you played for atmosphere, that is a theatrical expression, is it not?

Mr. Stearns: Objected to.

A. Not altogether, no, sir.

Q. Is it or is it not a theatrical expression?

COURT: The objection is sustained.

Mr. Goldstein: May I have an exception?

Q. In the afternoon of May 10th you say you saw Mr. Gates?

A. Yes, I did.

Q. Did you or did you not meet Mrs. Johnson in the afternoon?

A. I met Mrs. Johnson at the Imperial Hotel.

(Testimony of Miss Ruth Meade)

Q. Please answer the question. Did you or did you not meet Mrs. Johnson in the afternoon?

A. I did not.

Q. Isn't it a fact you met Mrs. Johnson, Mr. Gates and Sheriff Hurlburt in the afternoon?

A. Of what day?

Q. Of May 10th.

A. I don't remember, no.

Q. Would you say you did not?

A. I wouldn't say I did not, no.

Q. Well, you just stated positively—

A. I met Mrs. Johnson that night.

Q. That you didn't see Mrs. Johnson until eleven o'clock at the Imperial Hotel. Now, what is the fact?

A. I saw Mrs. Johnson at eleven o'clock at the Imperial Hotel.

Q. Would you say you didn't see her in the afternoon?

A. I say yes.

Q. You didn't see her?

A. I did not, no, sir.

Q. Isn't it a fact there were arrangements made as to what you were to do at these road-houses, in the afternoon of May 10th?

A. Yes, there were arrangements made, yes.

(Testimony of Miss Ruth Meade)

Q. Who made the arrangements?

A. Mr. Christoffersen gave them to Mr. Gates and told me what they expected.

Q. Where was this conversation you had?

A. Mr. Gates and Mr. Christoffersen were in the studio, in my office.

Q. What did Mr. Gates tell you, if anything, then?

A. Mr. Christoffersen told us we were to go out, and if the law was being violated, to get the evidence.

Q. What else did he say?

A. That is all.

Q. Nothing else was said.

A. Not that I remember.

Q. Wasn't there anything said about whether it was necessary to drink liquor?

A. It was surely necessary, yes, to take it, if it was there.

Q. I beg you, please, Miss Meade, to answer the question: Was anything said about the necessity of drinking liquor?

A. No, there was nothing said about that.

Q. Was there anything said about the necessity of taking liquor if any could be secured?

A. Of buying it, do you mean?

Q. Yes.

A. Absolutely.

Q. Well, I asked you what was the conver-

(Testimony of Miss Ruth Meade)

sation Mr. Christoffersen had with Mr. Gates or you, and you said all he said was, if there was any violation, to find out. Now what were the facts?

A. If they were selling liquor out there, to obtain evidence.

Q. What did he say as to how you were to go out there, what you were to do.

A. He didn't say.

Q. Nothing was said.

A. Not that I remember.

Q. At that time wasn't there a discussion as to the roadhouses you were to see?

A. In what way do you mean?

Q. As to what roadhouses you were to go to?

A. There may have been, yes.

Q. Was there or was there not?

A. I don't remember all the conversation at that time.

And the following testimony of said witness:

COURT: You are asking that question.

Q. Now, I will ask you, Miss Meade, whether or not you gave that testimony, as I read it to you, at that time and under those circumstances.

A. If I gave that testimony I was mistaken in the date that you asked me when I was in Sheriff Hurlburt's office.

(Testimony of Miss Ruth Meade)

Q. Will you please answer the question? Did you give the testimony as I read it to you?

A. I must have, if you have it written.

COURT: But you say now you were mistaken?

A. If I gave that testimony I was mistaken in the date asked me that I was in his office at the time.

Q. Your memory was much more refreshed at that time than it is now, was it not?

Mr. Stearns: That question is objected to. She has already stated, if she said it was on the 10th she had the conversation she was mistaken.

COURT: That is argumentative.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Q. Have you discussed this case since the last trial with anyone in the United States Attorney's office?

A. Which case?

Q. I am talking about the Merrill trial, since the trial last July.

A. I have, yes.

Q. With whom have you discussed it?

A. Mr. Stearns.

Q. Who else?

A. Mr. Stearns alone.

Q. How many times did you discuss it with him?

(Testimony of Miss Ruth Meade)

A. Twice.

Q. And when were these two times?

A. I don't remember just when they were.

Q. How long ago?

A. They were perhaps the date that the trial was called for, I came up to the office.

Q. December 19th?

A. Yes.

Q. When was the last time?

A. I don't remember. It has been several days ago.

Q. Several days ago?

A. Yes, it has.

Q. At the time you discussed it with him was anybody else present?

A. No, sir.

Q. Did you read your transcript?

A. I did, yes.

Q. Did you suggest it?

A. No, I did not.

Q. He suggested it to you?

A. Yes, he did.

Q. What did he say to you about that?

A. Well, he spoke that he would want to go over it with me, and I consented—that I wanted to myself.

Q. Did you take it home with you?

A. I did not.

Q. Did you read it in his office?

(Testimony of Miss Ruth Meade)

A. I did.

Q. Did you discuss the case with him as you read it?

A. I did.

Q. Now, Miss Meade, I will ask you if it is not a fact that you did receive instructions as to all these roadhouses at one time, prior to going out to Merrill's roadhouse? Did you? Yes or no.

A. I don't know just what you mean.

Q. I will ask you whether or not it is not a fact that you received definite instructions as to all these roadhouses prior to going out to Merrill's place.

A. No, not about all of them.

Q. About how many of them?

A. I don't know.

Mr. Stearns: If your Honor please, I don't see that that is in this case particularly.

A. May I say this? I wish to say this: That those cases were not all discussed any one certain time or any certain place.

COURT: You talked about them several times with the officers?

A. Yes, sir.

COURT: As you went from place to place you talked about them?

A. Yes, there was no outline definitely given us.

(Testimony of Miss Ruth Meade)

Q. Was a discussion had as to any particular number of roadhouses prior to going out to Mr. Merrill's place?

A. No, there was not.

Q. I will ask you what you got paid for your work?

A. For what work?

Q. For your work in helping the prohibition agent.

Mr. Stearns: You mean in the Merrill case?

Mr. Goldstein: In the Merrill case.

A. There was no special remuneration for the Merrill case.

Q. Will you please answer my question?

A. There was remuneration for all of them.

Q. What did you get paid? Please answer my question.

A. Do you want just exactly how much it would figure?

Q. No, how much did you get paid?

A. I got paid a lump sum for all of them.

Q. How much did you get?

A. I got \$50.00.

Q. For how many?

A. Eight cases.

Q. What was the time within which you investigated these eight cases? How many days?

A. It covered a period—it began on the

(Testimony of Miss Ruth Meade)

10th, and I believe the 10th was on Friday, Thursday or Friday—I don't remember just the exact day—

Q. I don't care about that.

A. And I think the last night was Monday night. We didn't go out Sunday night.

Q. In other words, you investigated these eight cases in three days?

A. Yes, we did.

Q. You stated, I believe, that there was no liquor taken by Mr. Gates in the taxicab on the way out?

A. There was not.

Q. I will ask you if it is not a fact, that, during those three days investigating those roadhouses, there were three or four times when such liquor was taken out.

Mr. Stearns: Just a moment.

COURT: The objections will be sustained to that.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Q. Now, do you recall anything said, when you left Mr. Merrill's place, about taking liquor home?

A. What do you mean? When?

Q. When you left Mr. Merrill's. You only went there once?

(Testimony of Miss Ruth Meade)

A. You mean, before we left it, during the evening, or after we left it?

Q. As you left Mr. Merrill's.

A. After we left it—I remember as we left, I knew they were going to get some—I know that, as we left it, that Mrs. Johnson had gone out first, and I know that when we got into the cab he asked us if the liquor was in the cab.

Q. Did you hear anybody ask Mr. Merrill? for any liquor to take with them?

A. Not at the time; no, I did not.

Q. Did you hear Mr. Gates ask him?

A. I don't think I did.

Q. So you didn't hear any conversation, then, between Mr. Gates or Mrs. Johnson and Mr. Merrill about taking any liquor from the place?

A. No, I did not.

Q. How?

A. I did not.

Q. And you didn't see any liquor pass between Mr. Merrill and Mr. Gates or Mrs. Johnson?

A. I did.

Q. When was that?

A. The drink that was served.

Q. I am talking about these bottles now.

A. No, I did not.

Q. You didn't see any bottles passed?

A. No.

(Testimony of Miss Ruth Meade)

Q. Now, did you feign intoxication on the way out to Mr. Merrill's place?

A. Just the same as I did when I was there, to a certain extent.

Q. Please answer the question. Did you feign intoxication on the way out?

Mr. Stearns: She has already answered that question. She said just the same as she did when she was out there. She has already testified to what she did when she was out there.

COURT: I think that is an answer to the question.

Q. By that you mean laughing and boisterous in the cab?

A. Yes.

Q. And what was the purpose of doing that?

A. Well, the main purpose was to keep the taxi driver from knowing our errand.

Q. For what?

A. Keeping the taxi driver from guessing our errand.

Q. Was that discussed prior to getting into the cab?

A. No, it was not.

Q. And you had never been on any of these trips before in your life, had you?

A. No, I never had.

Q. You had never been in a roadhouse before that?

(Testimony of Miss Ruth Meade)

A. No, I never had.

Q. Did you tell that to Mr. Gates?

A. I did, yes

Q. Before you started?

A. I don't remember whether it was before I started or not. I don't remember.

Q. Did you tell that to Miss Randall, that you had never been out to a roadhouse?

A. Miss Randall knew it, yes.

Q. Did you tell them you don't drink?

A. I did, yes.

Q. Did you tell them before you started?

A. They knew it, yes, sir.

Q. Yet you were required to drink at these places?

A. I was required to taste it, yes, sir.

Mr. Stearns: That is simply argumentative, if the court please.

Q. Were you required to drink?

A. No, we were not required to drink. We were required to taste it.

Q. Who told you you were required to taste it?

A. Nobody.

Q. Nobody told you?

A. No, sir.

Q. You did that of your own volition?

A. I did, sir.

Q. Did you know you were required to play the piano for atmosphere?

(Testimony of Miss Ruth Meade)

A. I did not, no.

Q. You claim you did that of your own volition?

A. I did.

Q. Isn't it a fact that you played the piano in all these eight roadhouses?

Objected to.

COURT: That is objectionable. I have ruled it out several times. I wish counsel would not refer to it again.

Mr. Goldstein: May I have an exception.

COURT: You may have an exception, yes.

Q. Now, did you feign intoxication at anybody's request?

A. No, I did not.

Q. And you did that of your own volition?

A. I did.

Q. How about smoking cigarettes? Did you ever smoke cigarettes before in your life?

A. I did not.

Q. They knew that, of course?

A. They did.

Q. Did you get a cigarette to smoke from Mr. Gates in the cab?

A. I did.

Q. Did you attempt to smoke it?

A. Partly.

Q. At whose request? Did he suggest you trying to smoke it?

(Testimony of Miss Ruth Meade)

A. I don't think he did, no.

Q. Did you do that also of your own volition?

A. Yes.

Q. You thought that was all part of the game to play for atmosphere?

A. Yes, sir.

Q. You were playing your part in this game?

A. I was not playing a part. I was doing the thing that I thought best.

Q. What?

A. I was doing the thing I thought best.

Q. You were doing what you thought best, without having had any previous experience?

A. I was, yes.

Q. When you were left off at Thirtieth and Belmont, I believe, on your way home—were you feigning intoxication on your way home?

A. I was not.

Q. You didn't keep it up on your way home?

A. No, we didn't; not as much as going out, no.

Q. But was any of it kept up on the way home?

A. We were talking and laughing. That is all.

(Testimony of Miss Ruth Meade)

Q. Was that part of the game or was it because it was natural?

A. It was.

Q. Was it part of the game on the way home?

A. Absolutely.

Q. Was that discussed?

A. No.

Q. When you got off at Thirtieth and Belmont—is that where you got off?

A. Yes, it is.

Q. Had anything been said about Mrs. Johnson giving a check for the fare?

A. No.

Q. There hadn't been a thing said about it.

A. I don't remember whether we discussed that or not.

Q. Did you know at that time whether Mr. Gates would have enough money to pay?

A. Well, I knew when it was discovered that he didn't have any left.

Q. I am asking you if it was discussed prior to your getting off.

A. I know, just before I got off, it was mentioned something about money, I know, he didn't have any left.

Q. Did you know Mrs. Johnson was to give a check?

A. No, I didn't, until I began to get ready

(Testimony of Miss Ruth Meade)

to get out. I always carried this purse, with my check book. She offered to give a check, and I happened to have a blank check, and I gave it to her.

Q. Then it was discussed prior to your getting out?

A. Just when I got out.

Q. As a matter of fact, didn't you testify, at the last trial of the Merrill case, that you knew nothing about giving this check?

Mr. Stearns: Just a moment. If that is an impeaching question, kindly refer to her answer.

COURT: Was that in the trial in this court?

Mr. Goldstein: Yes.

COURT: You may answer that, if you know.

Q. Did you know that?

A. Know what?

COURT: Refer to the testimony.

Q. I will ask you if you didn't testify on July 16, 1923, at this trial, the following testimony:

“Q. Do you know how it was that Mrs. Johnson paid him instead of Mr. Gates?

A. I presume because he was out of money. I got out of the cab first, and I don't know about afterwards.

Q. Wasn't it discussed afterwards

(Testimony of Miss Ruth Meade)

that that was good evidence against the taxi driver?

A. Not that night, no."

Didn't you so testify?

COURT: That is not going into the question you asked the witness.

"Q. Do you know how it was Mr. Johnson paid him instead of Mr. Gates?

A. I presume because he was out of money. I got out of the car first, and I don't know about afterwards."

Didn't you so testify?

A. I did. And I gave Mrs. Johnson a check, and she gave a check to the taxi driver.

Mr. Bynon: If your Honor please, I think it is high time counsel was required to conform to the rules. That doesn't impeach the testimony here.

COURT: It has not the effect to impeach this witness. It is only confusing, is all. I think you must have been mistaken as to the testimony as written.

Mr. Goldstein: I take an exception. I think I have a right to draw my inference from the testimony she gave at the last trial that she knew nothing about it until after.

COURT: You were asking this witness as to her conversation with Mrs. Johnson as to a check, but you switched off there as to the con-

(Testimony of Miss Ruth Meade)

versation as to whether Gates had money. It is confusing. You made it confusing.

Q. I will ask you this: I will ask you if you testified, at any time at the last trial, that you were asked to furnish a check blank?

Mr. Stearns: If your Honor please, —

COURT: That is not impeaching. She probably does not remember all that she said in that record.

Mr. Stearns: She might not have been asked that question, furthermore, your Honor.

Mr. Bynon: We are trying this case on its merits.

Mr. Goldstein: I can answer one at a time. I can't answer both of you.

Q. How many drinks did you drink there, Miss Meade?

A. I didn't drink any?

Q. How many did you taste?

A. I tasted four.

Q. Were you present when Mrs. Johnson was offered a drink the first time?

A. I know that we were all present when the first drink was served.

Q. You know that Mrs. Johnson refused the first drink?

A. I do.

Q. How?

A. I believe she did, yes.

(Testimony of Miss Ruth Meade)

Q. Did you hear her say anything as to her reason?

A. All I heard her say was that she didn't like the looks of it.

Q. And you tasted yours?

A. Yes.

Thereupon, Miss Martha Randall was called as a witness for the plaintiff, and after being sworn, testified that she lives in Portland, was Superintendent of the Women's Protective Division of the Police Bureau, knew Mrs. Ethel V. Johnson, Miss Ruth Meade, witnesses on behalf of the Government, and induced them to assist the officers of Multnomah County, Oregon, and the Federal Agents in procuring evidence of liquor law violations in road houses adjacent to Portland.

On cross-examination, Miss Randall stated that to the best of her knowledge neither Mrs. Johnson or Miss Meade drank liquor. That it was possible they might have to drink on such investigations but that the thought had not occurred to her that they might be called upon to drink liquor and to feign intoxication.

Thereupon and on redirect examination and over the objection of defendant the following question was asked and answer given:

Q. Now, Miss Randall, you may state whether or not you knew Mrs. Johnson and Miss Meade to be reliable, responsible girls at the

(Testimony of Miss Randall)

time that you recommended them for that mission?

A. I knew them to be reliable, respectable women.

To the admission of which defendant was allowed an exception.

And thereafter the following proceedings were had:

Now, with respect to the possibility of their having to drink out there—

COURT: I don't think you need go into that.

Mr. Stearns: Well, perhaps not. It was brought out by counsel.

COURT: I know it was brought out, but it is wholly immaterial.

Mr. Stearns: That is true, your Honor. It is.

Mr. Goldstein: I take exception to your Honor's remarks about that.

COURT: Well, I want to put an end to this. To which rule defendant was allowed an exception.

Thereupon H. L. Barker, a Federal Prohibition Agent, was called as a witness for plaintiff. Over the objection of defendant, the witness was permitted to testify that on the 15th day of May, 1923, he was handed a search warrant for defendant's place and in company with others arrived there between

(Testimony of H. L. Barker)

11 and 12 o'clock in the morning and after serving the warrant searched the entire premises, finding only empty liquor bottles (gin and manhattan), until late in the afternoon when they found some liquor in a paper sack under the steps leading from the second story of the house to the second story veranda, adjacent to the bed room of the defendant and his wife. (Thereupon witness identified ten bottles of intoxicating liquors, Government's exhibits 3 to 13 inclusive, as the liquor found under the veranda.)

To all of which testimony defendant was allowed an exception.

Thereupon P. V. Rexford, Deputy Sheriff, was called as a witness on behalf of the Government and testified that on the 15th day of May, 1923, he visited the Twelve Mile House in company with others arriving at about 11:30 A. M. and assisting in searching the premises, finding empty bottles of different kinds, many of them being empty gin and manhattan cocktail bottles, such as those introduced in evidence. Whereupon defendant moved that all testimony of the witness as to occurrences of May 15th be stricken out as being not responsive to the allegations of the information and withdrawn from the consideration of the jury as immaterial, which motion was overruled and an exception allowed thereto and exception to all of the testimony of the witness concerning the occurrences of May 15, 1923.

(Testimony of P. V. Rexford)

The witness thereupon, subject to said objection and exception, testified that he found a paper carry-all bag under the steps leading from the second story of the house to the veranda on the second floor containing 10 bottles of intoxicating liquor which bottles were by him identified as Government Exhibits 3 to 13 inclusive. On cross-examination witness testified that he went on the search at the request of Deputy Sheriff Christoffersen and was instructed to search the place. He testified that this instruction was given on the way out in an automobile, but he received no instructions at the court house.

The witness was asked whether the Twelve Mile House was the only place he was going to search and answered that it was not; that he had been to another place, that other places were discussed after they got to the Twelve Mile House, whereupon the following proceedings were had:

Q. You said you had been to a number of places on May 15th? Where were you?

Objected to.

COURT: Objection sustained.

To which ruling the defendant excepted.

Thereupon Lloyd Linville, a Federal Prohibition Agent, was called as a witness on behalf of the Government. He testified that on May 15th, 1923, in company with others, he drove to the Twelve Mile House, sometimes known as the Plantation Inn, ar-

(Testimony of Lloyd Linville)

riving about 11:30; that they found a bottle in back of the bar with perhaps a teaspoonful of intoxicating liquor in it and that they searched all parts of the house and the outer buildings, and found a number of empty gin and cocktail bottles, and also several pint whiskey bottles back of the bar.

Thereupon T. M. Hurlburt, being called as a witness for the Government, testified that for nine years he had been Sheriff of Multnomah County, Oregon, and had been acquainted with Mr. A. B. Gates for past two or three years, and that Gates had been a deputy sheriff since about the middle of May, 1923. That while Gates was working as a general agent out of the Seattle office he had arranged with Gates to inspect the roadhouses in Multnomah County to determine whether the liquor laws were being violated.

That he saw Gates on the morning of May 11th, the morning after the investigation, and that his appearance was as usual, he gave no sign of having been drunk, and a full report of the occurrences on the night of May 10th, and that his mind seemed clear. On cross-examination the witness testified that he could not remember that Gates had ever been employed by him prior to May, 1923, except for a day or two on Prohibition enforcement work. Whereupon on cross-examination the following proceedings were had.

(Testimony of T. M. Hurlburt)

Q. Mr. Hurlburt, you had Mr. Gates working for you prior to May 10, 1923?

A. No, he wasn't working for me at that time.

Q. I ask you if you had Mr. Gates working for you on several occasions prior to May 10th, 1923?

A. Well, if he did, it is quite a long time before, because he had been connected with the Government for some time.

Q. Well, Mr. Hurlburt, do you remember whether or not he ever worked for you prior to May 10, 1923?

A. Well, not only perhaps for a day or two, is all. He may have worked a day or two.

Q. If he worked for you—you say he did work for you a day or two—what was he doing for you?

A. The only work he has ever done for me was engaged in the prohibition enforcement laws.

Q. Who paid his expenses, Mr. Hurlburt?

Mr. Stearns: Now, if your Honor please, this is really not cross-examination.

Mr. Goldstein: This is for the purpose of impeachment, purpose of credibility. I want to know what arrangement he had with Mr. Gates. Mr. Stearns asked him whether he had made arrangements with Mr. Gates on May 10th for

(Testimony of T. M. Hurlburt)

the purpose of raiding roadhouses. He also asked him how long he had known Mr. Gates. I am at this time attempting to ascertain from Mr. Hurlburt whether Mr. Gates had been in his employ prior to that time, what he had been employed for, and what arrangements he made with him on May 10th. That he went into on direct examination. I believe it is open on cross-examination to determine the extent of his employment of Mr. Gates, if he was employed.

COURT: That is the very question the court has tried to keep out of this case from the very beginning. It will not be opened up now.

Mr. Goldstein: May I ask who paid his expenses; who paid the expenses of Mr. Gates?

COURT: That is immaterial. It is not cross-examination.

Q. You state he was employed as a deputy sheriff; when did he enter your employ as a deputy sheriff?

A. When he severed his connection with the Government.

Q. When were his connections with the Government severed?

A. My impression is, along about the 23rd day of May, or 24th.

Q. Isn't it a fact that it was just four days after the raid?

A. I say, I am not positive of the time, but I think it was greater than four days—oh, after the raid?

(Testimony of T. M. Hurlburt)

Q. Yes.

A. It might have been four or five days.

Q. Why did he enter your employ, if you know? How did you happen to employ him?

A. How—I kept him employed there.

Q. Is it not a fact you employed him for the purpose of using him as a witness in these roadhouse cases?

Objected to.

COURT: The objection to that will be sustained. That is not cross-examination.

Mr. Goldstein: May I ask how long his employment is to continue?

Mr. Stearns: If your Honor please, it doesn't matter.

COURT: I will not permit you to pursue that.

Mr. Goldstein: May I have an exception? I think I have made it clear that I am endeavoring to ascertain certain information about the nature of his employment.

COURT: Well, you will not be permitted to ask that. He has a right to employ this man. He is not required to give his reasons for it, either.

Mr. Stearns: If your Honor please, if it was counsel's intention to imply by that question that Mr. Gates is held, or is employed by Mr. Hurlburt simply in order that he may act as a

(Testimony of T. M. Hurlburt)

witness here, and that he is to be dismissed immediately after this trial, I am going to withdraw my objection to that last question.

COURT: The court will not hear that. It is not testimony in this case.

Mr. Goldstein: If counsel desires to withdraw his objection, I may ask him impeaching question.

COURT: Not with the consent of the court.

Mr. Goldstein: I have a certain question to ask him as to certain facts.

COURT: Matter material to this case?

Mr. Goldstein: Your Honor has held it was not material, but he has withdrawn his objection.

COURT: The court will not permit that to be gone into.

Thereupon, defendant Fred Merrill having been sworn and having testified, upon cross-examination, the following proceedings were had:

Q. Now, you testified here that, when these people first came out to your place of business, Mr. Gates came up to the bar, and flourished a bottle of amber colored liquor?

A. That was the second time that he, when he asked me for some Scotch, that he had the amber. The first time he had a bottle with a little in it, but I didn't get a good look at that, because he was holding it in his hand. The oth-

(Testimony of Fred Merrill)

er bottle, he held it in the air.

Q. He had two bottles?

A. When he came and asked for Scotch, he had almost a full bottle of amber colored whiskey.

Q. Didn't you testify at the last trial he had one bottle?

A. That is all I saw. The other bottle, he says "Have a drink with me." I stopped him right there, before he exhibited it. I didn't see what he had in that.

Q. Now you are claiming he had two bottles.

A. The bottle that I saw last was almost full of whiskey.

Q. Well, then, that was two bottles?

A. He asked me to have a drink from another bottle, that was not full. I couldn't—

Q. Do I understand you to say that Mr. Gates had two bottles of liquor altogether?

A. Well, he must have had two bottles.

Q. Well, you know whether you saw him with a bottle of clear colored liquor and a bottle of amber colored liquor?

A. He took out a bottle, he held it so tight in his hand I couldn't get a good look at it. He was talking to the chauffeur there.

* * * * *

Q. Didn't you testify you gave him

(Testimony of Fred Merrill)

(Gates) this glass of stale ginger ale just to get rid of him?

A. After he had bought a bottle of ginger ale, and he come back and he bothered me again there, and insisted upon—wanted to know if I couldn't find one drink of Scotch, and I slid this bottle over to him to get rid of him. I didn't think he knew what he was drinking.

Q. You thought he didn't even know what he was drinking?

A. I don't think he knew what Scotch would be, anyway.

Q. He must have been pretty drunk, then, if he didn't know what he was drinking?

A. I knew he was a whiskey drinker.

Q. How about that? Wasn't he pretty drunk, then, if he didn't even know what he was drinking?

A. I didn't say, on that account. I say it because he looked like a whiskey drinker.

Q. He looked like a whiskey drinker?

A. Yes, all inflamed.

Q. Didn't you think he certainly would know whether it was whiskey or not? How about that?

A. I think he would drink anything.

Q. And think it was whiskey?

A. Anything that had alcohol in it.

Q. Did this drink have alcohol in it?

(Testimony of Fred Merrill)

A. What is that? His stuff?

Q. No, the drink you gave him there?

A. No, sir. I wouldn't keep it there.

Q. Yet you accepted fifty cents of his money for the drink?

A. I couldn't help accepting it, because I didn't find it for several minutes after he went out.

* * * * *

Q. Now, when this party (Mr. Gates, Mrs. Johnson and Miss Meade) left on that occasion, you say that they had a package containing two pint bottles of liquid?

A. They had a package.

Q. Which was wrapped up in newspaper?

A. Yes, sir.

Q. You say that Charley, the porter, gave it to you, and you handed it to the guests?

A. I handed this to them when they went to go away.

Q. Whom did you hand it to?

A. I handed it to Mr. Gates. I said: "This is something you left behind the chair." He never denied it.

Q. Did you see these people come in with that package when they came that night?

A. No, sir, I didn't see them come in.

Q. You didn't see them bring the package in?

(Testimony of Fred Merrill)

A. I didn't see them come in at all. I was in the kitchen.

Q. You say that there were two pint bottles in that package?

A. There was a package. I didn't know what there was, because I was busy. I laid it right there.

Q. Didn't you testify, on direct examination, there were two pint bottles of liquid in that?

A. That is an inference that I drew, the two shaped bottles, the package.

* * * * *

Whereupon the following proceedings were had:

Q. Mr. Merrill, have you ever been convicted of a crime?

A. No, sir.

Q. I will ask you if you ever have sold any liquor out at the Plantation Inn?

A. Sold any liquor?

Q. Yes.

A. I personally, when the country was wet, never personally sold a drop of liquor at the place.

Q. I will ask you if you didn't sell liquor out there after the country went dry?

A. What is it?

Q. I will ask you if you didn't sell liquor

(Testimony of Fred Merrill)

out there in violation of law, after the country was dry?

A. No, sir.

Q. Mr. Merrill, I will ask you if it is not a fact that, on the 6th day of September, 1910, you pleaded guilty to the crime of selling liquor, in quantities less than a gallon, out of the Twelve Mile House?

A. No, sir.

Mr. Goldstein: That is an unfair method of examination. The question previous to that was did you ever sell liquor out there after the country was dry? Immediate question after this is, if he sold any liquor in 1910. And that is at a time when your Honor, and I, and the jury know that the country was wet, and it was perfectly legitimate to sell liquor. Now, it is a method of presenting this case that I don't think is proper. I make this explanation so there may be no misunderstanding or confusion.

COURT: Is this 1910 you are inquiring about?

Mr. Bynon: Yes, your Honor. The question was, "Were you ever convicted of a crime? Did you ever sell liquor out at the Twelve Mile House in violation of law?"

Mr. Goldstein: He said when the country was dry.

Mr. Bynon: I first asked him if he ever

(Testimony of Fred Merrill)

sold liquor out there in violation of law. I propose to introduce this record of the County of Multnomah, State of Oregon, that goes to that question.

Mr. Goldstein: That is 1910.

Mr. Bynon: Yes, and it shows he violated the law.

COURT: The question here is whether or not he has been convicted of an offense. He says no. Now, you say he has.

Mr. Bynon: Yes, your Honor, and he so stated.

COURT: Have you got the record there?

Mr. Bynon: Right here, your Honor, in my hand.

COURT: Show it to him and let us see what comes of it.

Q. I will now hand you certified—

Mr. Goldstein: Show it to him without reading it, Mr. Bynon, you understand the rules.

COURT: He has a right to read from the record, Mr. Goldstein. We are taking a whole lot of time. He is calling attention to it by reading from it, but the witness has a right to see it before he answers.

Mr. Bynon: Yes, your Honor, I intend to hand it to him.

COURT: Go ahead.

Q. I now hand you certified copy of the

(Testimony of Fred Merrill)

record in the case of the State of Oregon, Plaintiff, vs. Fred T. Merrill, No. C-1534.

A. I saw this and read it at the last trial. I never was arrested in my life. I never sold a drink in my life, and my bartender and waiter sold a glass of port wine, a glass of beer at half past 1 o'clock at night, and I was sick in bed at the time, and this trial—it never came to trial.

Q. Pardon me interrupting.

COURT: Does that show that he was convicted of an offense?

Mr. Bynon: It shows he plead guilty to that violation of law your Honor.

COURT: Read the record to the jury.

Mr. Goldstein: May I have an exception?

Mr. Bynon: I will introduce this record in evidence, and ask that it be marked.

A. I never went to trial. I never was accused of it.

Mr. Goldstein: May I have an exception to that?

COURT: Yes.

Mr. Goldstein: I want the record to show objection on the ground of incompetence, irrelevance and immateriality.

COURT: It may show your objection, show the ruling of the court that your objection is not well taken, and exception allowed.

Mr. Bynon: I don't care to take up the

(Testimony of Fred Merrill)

time of the court in reading that. I may refer to it in argument, your Honor.

Marked "Government's Exhibit 14."

Q. It is not a fact, then, Mr. Merrill, that you did plead guilty.

A. I never did plead guilty.

Q. And were fined \$250.00?

A. I never was tried, and never went into the court-room, if you please.

Mr. Goldstein: Now, you may make a statement of that.

Mr. Bynon: I am still examining the witness, Mr. Goldstein.

COURT: The only question here is as to whether he was convicted of an offense, and he said no. Then that record admitted here would show that he was convicted of an offense. That is the end of that. There is no use taking up time of the court.

Mr. Goldstein: The witness was making an explanation about that.

COURT: I don't think the witness can deny the record, and it is not necessary for him to go into it. I will not permit it.

Mr. Goldstein: May I have an exception, if your Honor please.

COURT: You may have your exception.

On redirect examination of defendant the following proceedings were had:

(Testimony of Fred Merrill)

Q. Now, counsel asked you if you had been convicted of a crime, and you denied it, and then introduced in evidence Government's Exhibit 14, in which George Stewart and Fred Horn are joined with you to the effect that in 1910 you were charged with the offense of selling liquor in quantities of less than one gallon without a license. Who were George Stewart and Fred Horn?

A. They was a waiter and the other man that worked there for me.

Q. Were you present in your establishment on that day in 1910?

A. I was not. I was sick with a broken collar bone.

Q. Why did you deny that?

Mr. Stearns: If your Honor please, I think this is an attempt to impeach the judicial record of the court in which this man was convicted. I think the record speaks for itself, your Honor.

A. I was never in court.

Q. Explain that. Why did you deny that?

A. Because I never was in court.

Q. What are the facts concerning that?

COURT: I don't think you can go into that case.

Q. Had you ever appeared in court?

A. No, sir.

(Testimony of Fred Merrill)

Mr. Stearns: Now, if your Honor please, here is a judicial record which states that Fred Merrill came personally into court himself, and his attorneys, and entered a plea of guilty, if it were permissible for this man to deny the record in this case, then records of courts of law would be valueless.

COURT: If that is what the record says, the court will not permit any denial of it.

Mr. Stearns: That is what the record says, your Honor.

A. I can prove it by John Logan, your Honor.

COURT: What?

A. I can prove by John Logan that he settled it out of court unbeknown to me.

COURT: You cannot go into that.

Mr. Goldstein: I would like to show, if the court please, the fact that he knew nothing about the alleged violation of the waiter or bartender of his place, and that this plea was entered, so far as he understood for and on behalf of the waiter and bartender. May I show that?

COURT. No.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: Yes, you may have an exception.

Thereupon Ivan M. Sherman, called as a witness for defendant, being sworn, testified that he had

(Testimony of Ivan M. Sherman)

been a waiter for seven or eight years and was employed by the defendant at the Plantation Inn from about the 1st of May, 1923, until the 1st of October, 1923, and was in his employ on the 10th day of May, 1923. He testified that he received instructions from defendant to allow no liquor around the place and to keep it in suppression as much as possible. He also testified that soft drinks were served but that no liquor was sold to anyone. The witness remembered the occasion of the visit of government witnesses, Gates, Johnson and Meade, to the Twelve Mile House on May 10th, and that Gates let it be known that he was a stock man from Eastern Oregon. He stated that by their actions and manner Gates and Mrs. Johnson had been drinking when they arrived; that Gates pulled out a pint flask of amber colored liquor about five minutes after he arrived and before he had seen the defendant, and said to witness, "Bring in some Scotch, I'm tired of this stockyard booze." He said that Gates with two ladies and a chauffeur partook of chicken dinner and had four rounds of ginger ale, but that no liquor was served by him to Gates and his party and that he saw none served by Merrill, and that the only liquor drunk was from Mr. Gates' bottle.

On cross-examination, the witness testified that he lived at the Twelve Mile House and was supplied his board and lodging by the defendant and

(Testimony of Ivan M. Sherman)

made his pay by tips which averaged about \$35.00 a week and that he knew nothing about the liquor which the officers claimed to have found under the steps of the veranda at the time of the search on May 15th, and further testified as follows:

Q. You say you had had instructions from Mr. Merrill not to admit persons in an intoxicated condition to that house?

A. Not if they were drunk or obnoxious.

Q. Let me ask you this, Mr. Sherman: Isn't it a fact that Mr. Merrill had told you that, in admitting persons to that house in a drunken condition, you might use your own judgment?

A. To a certain extent.

Q. Well, now, to a certain extent—what do you mean by a certain extent?

A. Well, as in this case, there was no one there at the house at the time, a man come out to ask for chicken dinners, couldn't very well turn him away.

Q. Mr. Merrill had actually told you, had he, that you might, if you saw fit, admit drunken persons to that house, is that correct?

A. I wouldn't say drunken, because—

Q. Well, now, just answer the question. Is that correct, or is it not?

A. No.

Q. Well, now, I call your attention to the testimony which you gave at the former trial

(Testimony of Ivan M. Sherman)

of the case, and I am reading from the transcript of that testimony.

Mr. Goldstein: What page?

Mr. Stearns: Bottom of page 217.

“Q. He actually told you that you might if you saw fit, admit drunken persons to that house? Is that correct?

A. Yes, sir.”

Q. Did you not so testify at the former trial of this case?

A. I don't remember.

Q. Well, if you did so testify, were you testifying truthfully at that time?

A. My idea of that, the extent of a man's drunkenness, a man—how he carried himself.

Q. I say, Mr. Sherman, if you did so testify at the former trial of this case, was that testimony truthfully given? You understand that question, don't you?

A. Yes, sir, it was.

Q. It was truthfully given?

A. Yes, sir.

Q. Then he did tell you that?

A. If I testified to that effect, yes.

* * * * *

Q. Was he (Fred Merrill) assisting in the kitchen that night?

A. I believe he was, for a while, yes.

Q. Now, you say that, to the best of your

(Testimony of Ivan M. Sherman)

recollection, Mr. Merrill was assisting in the kitchen that night?

A. Yes, sir.

Q. Now, I am calling your attention to cross-examination on pages 212 of the transcript of testimony taken at the last trial of the case, and I will ask you if you didn't then testify as follows:

“Had he been working”—that is in alluding to Mr. Merrill—“had he been working in the kitchen that evening?”

A. No, sir.

Q. Had he been cooking?

A. No, sir.”

Q. Did you so testify at the last trial, Mr. Sherman?

A. I don't remember.

Q. How is that?

A. I don't remember.

Q. Well, now, if you did so testify, was that true or was it not?

Mr. Goldstein: If the court please, that is argumentative.

COURT: I think he can answer that question.

Q. If you did so testify at that time, was that true, or was it not?

A. It must have been true if I testified at that time.

(Testimony of Ivan M. Sherman)

Q. Well, now, does that serve to refresh your memory? Do you recall now, your attention having been called to your former testimony, whether or not Mr. Merrill actually was working in the kitchen that night, or whether he was not.

A. I don't remember. It is seven or eight months ago. I really don't remember.

Q. Then when you testified a moment ago that he was working in the kitchen, you may have been mistaken?

A. I know that he has been out in the kitchen several occasions. I don't remember about that particular night now.

Q. How about Miss Meade? You remember Miss Meade, don't you? Did she appear to be under the influence of liquor?

A. No, sir.

Q. Was there anything unseemly or improper in the conduct of Mrs. Johnson?

A. No, sir, I wouldn't say there was.

Thereupon Russell Underwood was called as a witness for the defendant. He testified that he lived in Portland, Oregon. Had followed occupation of taxi driver and trap drummer, playing in orchestra work. That on May 10th, 1923, he met A. B. Gates, Ethel V. Johnson and Ruth Meade, witnesses for the government by being called to take them to the Twelve Mile House; that on the way

(Testimony of Russell Underwood)

to the Twelve Mile House, on the other side of Montavilla, where they drove under an arc light from an oil station, the government witness Gates put a bottle through the window of the cab, offering him a drink, calling it his stockyard stuff, and that the witness touched it to his lips to please Gates and handed it back to him, and out of the corner of his eye saw Gates tip the bottle up and heard what sounded like a gurgle from the back seat.

A. Each time after I handed it back to him, he took it out of my hand and immediately tipped it up, as far as I could see out of the corner of my eyes.

Q. You saw him do that each time out of the corner of your eyes?

A. Immediately when he took the bottle, he tipped the bottle.

Q. Could you see him place it to his lips?

A. I couldn't swear I seen him place it to his lips—but I seen him place it to his lips, I don't know how many times it was, but I heard the gurgle.

Q. You heard that gurgle each time distinctly, didn't you?

A. Yes, sir. Not each time—I wouldn't swear to each time. But I heard the gurgle of the bottle. It is an entirely different sound than the motor.

(Testimony of Russell Underwood)

The witness testified that on reaching the Twelve Mile House they went into the dance hall and from there into the soda fountain, where Gates pulled out a bottle of liquor and set it on the bar. He was told by Merrill to put it away. Thereupon the witness went out and started playing the trap drums with Mr. Merrill's permission. Later in the evening the witness ate dinner with the government witnesses, Gates, Meade and Johnson, and that during the dinner Gates made a fool out of himself; that he saw no liquor about the place except that in the possession of Gates. The witness before leaving asked employment of Mr. Merrill as a trap drummer and on the day after was engaged and worked there for about 2½ months immediately following May 10, 1923. That he never saw any liquor sold by Mr. Merrill nor any in his possession on the premises, although he acted as waiter part of the time.

Whereupon the following question was asked and proceedings had thereon:

Q. Were you a waiter there, too, or did you act as a waiter?

A. I filled in once in a while when the other waiter was in town or something, and worked as extra.

Q. As such waiter, did you receive any instructions from Mr. Merrill concerning liquor or the use of liquor by the guests?

(Testimony of Russell Underwood)

Mr. Stearns: Just a moment, if your Honor please. If that question is confined to the time prior to Mr. Merrill's arrest, I have no objection; but if it is since then it would be a self-serving declaration, and would not be admissible, I think.

MR. GOLDSTEIN: This is prior to May 15th, which is one of the alleged acts of nuisance. He was working prior to that time. I imagine your Honor would rule I could prove anything immediately prior, immediately subsequent so long as it is close enough to the alleged occurrence of the nuisance to show how the place was being conducted.

COURT: Confine it to the 15th.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: Yes.

Mr. GOLDSTEIN: I understand the court has ruled that I cannot show by this witness the method of conducting the place of business immediately after May 15th?

COURT: No.

Mr. Goldstein: I will take an exception to your Honor's ruling.

Q. Between May 10th and May 12th you were in his employ?

A. Yes, sir.

Q. Do you know what the instructions of

(Testimony of Russell Underwood)

Mr. Merrill were to the help with respect to liquor at that time?

Mr. Stearns: I think that question is objectionable, too, unless he can testify that he received instructions from Mr. Merrill between the time that he went to work for him and the 15th.

COURT: What instructions did he give you about that?

A. At that particular time I hadn't been there long enough; I had been playing trap drums there up to that time. I hadn't got any instructions about it.

Q. When did you first learn?

A. Well, I can't say exactly when. It was not very long after I was there, the first time I ever filled in as a waiter, extra.

Q. I will ask you when was it the first time you filled in as a waiter. Let's get that time.

A. Well, I can't state exactly that, because I don't remember. It was not—very soon after I started to work there, possibly two or three weeks after.

To which ruling the defendant was allowed an exception.

Thereupon C. E. Carroll, a witness on behalf of defendant, was called to the stand, sworn, and the following proceedings were had:

(Testimony of C. E. Carroll)

Q. What office, if any, do you hold, Mr. Carroll?

A. Sheriff of Jackson County.

Q. How long have you been Sheriff of Jackson County?

A. Five years the first of January.

Q. How long?

A. Five years the first of last January.

Q. Do you know a man by the name of Mr. Gates?

A. I do.

Q. When did you become acquainted with him, and for how long did you know him, and where was he located?

A. I think it was two years ago, or three years ago last summer, or in the fall.

Q. Where was he located?

A. In Jackson County.

COURT: Where?

A. At Medford, Jackson County.

Q. What was he doing there, do you know?

A. Do you want to know just what I call it?

Q. No, no. What was he doing there?

A. Well, that was the question I was going to answer for you.

Mr. Stearns: Now, if your Honor please, at this time I should like to know the object of counsel in calling this witness. If it is for the

(Testimony of C. E. Carroll)

purpose of attacking the character of Mr. Gates, then of course, he would be limited to the well known rule of common reputation in the neighborhood in which Mr. Gates resides. If it is for the purpose of impeaching some statement that Mr. Gates may have made on the stand, I call your Honor's attention to the fact that no foundation has been laid for any such attack by this witness.

Mr. Goldstein: This is preliminary to the question I am about to ask him.

Mr. Stearns: Furthermore, I call your Honor's attention specifically to the fact that Mr. Merrill, and not Mr. Gates, is the defendant in this case. Mr. Gates is not on trial here.

COURT: What is it you want to ask?

Mr. Goldstein: I am going to ask him if he knows the reputation of this man Gates for veracity in Medford, where he had been residing and working as a state Prohibition Agent, working under the county, Jackson County.

COURT: Do you know his reputation in Jackson County?

A. I do.

COURT: For truth and veracity?

A. I do.

COURT: Get to the question, then.

Mr. Goldstein: I thought I could ask a preliminary question or two as to what Gates was doing at that time, if he knows.

(Testimony of C. E. Carroll)

COURT: I don't think you can ask that question.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: You may have your exception.

Q. You state you know Mr. Gates' reputation for truth and veracity in Jackson County, Sheriff Carroll. What is it good or bad?

Mr. Stearns: Just a moment.

COURT: To what date do you refer?

Q. When was this two years? How long ago?

A. I would have to look at the records down there to find just the date, but I am under the impression it was two years ago last fall, and in August.

Mr. Stearns: Moreover, I should like to say to your Honor that this seems to be a departure from the rule, relative to the question in hand here. If I understand the law on reputation, the only question which would be permissible would be whether or not he knows the reputation of Mr. Gates in the neighborhood in which he resides. Now, Mr. Gates was only temporarily in that county. Mr. Gates' home is here in Portland, and he is best known here in Portland, and this, I think, your Honor, is the proper place from which to draw witnesses to

(Testimony of C. E. Carroll)

impeach Mr. Gates' character, if the defense is able to do so, not to go afield to some distant county of the state, where Mr. Gates happened to be temporarily sent on some mission.

COURT: How long was Mr. Gates down there?

A. He was there about three months, I should judge, making an off-hand guess.

Q. COURT: Three months?

A. Yes.

COURT: Long enough to form a reputation.

A. He certainly did form one.

COURT: That is two years ago?

A. I think it was two years ago about last August he came.

COURT: He was there temporarily?

A. Yes.

COURT: What is it you want to ask?

Q. You may state what was his reputation, whether it was good or bad.

A. It was bad.

COURT: Just a moment. I am in doubt whether that should be proceeded with. He was only there temporarily, for a short time.

Mr. Goldstein: I was asking Mr. Gates, if your Honor will recall, what he had been doing for the last four or five years, and most of his time he spent, not in Portland, but in go-

(Testimony of C. E. Carroll)

ing from place to place. He might have maintained a residence here, but his operations and place of business were in Medford, he testified to, and Salem, and Astoria, and Heppner; and if he stayed in Medford three months, sufficiently long to permit of reputation being established as to his truth and veracity.

COURT: I think the rule is that it must be confined to the community in which he resides, and I shall so hold in this case.

Mr. Goldstein: I will take an exception to your Honor's ruling.

COURT: You may have your exception. That may be stricken out.

Mr. Stearns: I ask that it be stricken out and the jury instructed to disregard it.

COURT: Yes, that may be stricken out, and the jury are instructed to disregard it.

Thereupon E. W. Aylsworth was called as a witness on behalf of the defendant. Testified that he was married and for three years had lived in Gresham across the road from the Twelve Mile House. Whereupon the following proceedings were had:

Q. I will ask you if you know the general reputation of that place, in that immediate community, among the neighbors, as to a place where liquor is being sold or kept?

COURT: Answer that yes or no.

(Testimony of E. W. Aylsworth)

A. Yes, I think so.

Q. Now, what would you say as to what its reputation is as a place—

Mr. Stearns: Just a moment.

COURT: Is it good or bad?

A. Well, it depends a little on what reputation is. If what you hear of a place is reputation, why, you hear lots of things. But not knowing particularly I don't know that—I would'nt say that I could say.

COURT: Can you say whether it is good or bad?

A. From what I hear?

COURT: Yes, from what you hear among these people you associate with.

A. I have heard that it was bad; and then I have heard that neighbors say right adjoining that they think most of this trouble he is into is mostly bunk; that they don't believe it; they don't believe he had it. I have heard that.

Q. But from what you know, what do you say would be the reputation?

COURT: Not what he knows.

Q. From the reputation you gathered among the neighbors those who knew—have means of knowing?

A. Well, those who live—

Mr. Stearns: The question is, as I understand it, first do you know the reputation of

(Testimony of E. W. Aylsworth)

that place in the neighborhood as to being a place where intoxicating liquor is kept and sold. that is, the common reputation.

COURT: Yes, that is the question. And that should be answered Yes or No; and then the further question should be put, is it good or bad. And that should be answered Yes or No.

Mr. Stearns: And that goes to the common reputation.

Mr. Goldstein: I think the witness ought to understand that it is the reputation among the neighbors in that community.

COURT: Well, those whom he associated with.

Mr. Goldstein: Yes.

Q. What would you say as to that reputation? Is that good or bad?

COURT: Is that good or bad?

A. Those who are—

COURT: Just answer the question now.

A. Could I answer the question?

COURT: Would you say that is good or bad?

A. I have heard lots of bad things about the place.

COURT: What?

A. I have heard it bad.

Q. I will ask you what you have heard as to the reputation of that place, as to whether it is good or bad?

(Testimony of E. W. Aylsworth)

COURT: That has already been explained to him.

Mr. Goldstein: I believe I am entitled to have the witness explain that answer, if it is susceptible of explanation.

COURT: I think it should stop where the witness puts it by his answer Yes or No.

Q. Well, can you answer what you have stated?

Mr. Stearns: I think that has been ruled on.

COURT: Yes, I think the witness has answered the question.

Q. Mr. Aylsworth, probably you misunderstand the question. You have heard the reputation of the place discussed by the neighbors, have you?

A. Yes.

Q. And you have also heard it discussed by people, outsiders, who are not neighbors?

A. Yes.

Q. Now, by the neighbors who are in position to know, have you heard it discussed among them?

A. Yes.

Mr. Stearns: Just a minute.

COURT: You have to take the whole thing together, and ask him whether it is good or bad.

Mr. Stearns: He has already done that your Honor; and, if the Court please, certainly

(Testimony of E. W. Aylsworth)

he would be bound by the answer of his own witness.

Mr. Goldstein: Oh, I don't know as that is such a rule. I have a right to have the witness explain the answer.

COURT: Well, you know that rule as well as anybody in the courtroom.

Mr. Goldstein: About what rule?

COURT: About impeachment on reputation.

Mr. Goldstein: I understand the rule perfectly.

COURT: You know the practice as well as any man in the courtroom.

Mr. Goldstein: I understand, but where a witness does not understand, I think he has a right to explain.

Q. Now, Mr. Aylsworth—

COURT: I think you have to stop now. I will not permit any further inquiry.

Mr. Goldsmith: May I have an exception?

COURT: Yes, you may have your exception.

Mr. Goldstein: May I state what I would expect the witness to state—not in the hearing of the jury? I want the record to show.

COURT: Whatever you state, you may state outside. This jury is an intelligent jury. And state it short.

(Testimony of E. W. Aylsworth)

Mr. Goldstein: This witness will testify that, among the neighbors who know, who are in a position to know, the reputation of that place is very good. But the reputation among those who are not in a position to know who base their information upon newspaper account and prejudiced reports, it is not good; and that is what he would explain if permitted to answer; and that he has been himself in the place many times.

COURT: You know that is not proper.

Mr. Goldstein: As preliminary?

COURT: What he ascertains by being in the place. That is not character testimony.

Mr. Goldstein: As preliminary to that question, I was going to ask him—

COURT: As preliminary or in any other sense.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: You may have an exception.

Mr. Goldstein: I think that is all.

Mr. Stearns: No cross-examination.

COURT: You may stand aside.

Thereupon J. J. Braund was called as a witness on behalf of defendant and testified that since April 3, 1923, he had lived and operated a garage and filling station three-quarters of a mile from Plantation Inn; that he knew the reputation of defend-

(Testimony of J. J. Braund)

ant's place in that community around May, 1923, as to being a place where liquor was kept and sold and testified that it was pretty good at that time. Whereupon cross-examination, the following proceedings were had:

Q. Yes. Now, may I ask with whom you discussed the reputation of that place on or before May 10, 1923?

A. Well, I can tell you Mr. Watson, who has lived there for—I think he told me thirty-five years.

Q. Where does Mr. Watson now reside?

A. He lives right there, at Eastwood, they call it.

Q. You say that you had a conversation with him as to the reputation of the Twelve Mile House?

A. Yes, sir.

Q. How did that conversation happen to come up, if you remember.

A. Well, a number of times, I have often asked about the Twelve Mile House, I have heard about it so much, I have asked about it. They have told me different stories. Some told me one thing, one another.

Q. Well, now, what had you heard of it prior to that time?

A. Well, I had heard that they had sold booze there, and I had heard that they hadn't

(Testimony of J. J. Braund)

sold booze there, and I had taken it up, asked Mr. Watson about it. There were three of us there at the time we had this talk. Mr. Watson said it one time was a very bad place, but since Merrill had taken hold of it this time it was getting pretty good.

Q. Is Mr. Watson still living?

A. Yes, sir.

Q. Still living out there?

A. Yes, sir.

Q. Do you see him in the court room here?

A. No.

Q. Now, with whom else had you discussed the reputation of Mr. Merrill's place prior to the 3rd day of May, 1923?

COURT: The 10th day.

Mr. Goldstein: Prior to when?

Q. I should say the 10th day of May, 1923?

A. Well, I don't know as we discussed so much before that, but after he was arrested, why, there was a lot of discussion around there.

Q. We are not interested in the discussion that took place afterwards, but we are interested in the reputation at the time and prior to the time that the raid was made.

Mr. Goldstein. I object to the limitation of the question, on this ground, that he might know the reputation on or about May 10th, and it might be by reason of some conversations he

(Testimony of J. J. Braund)

might have had with the neighbors subsequent to May 10th.

COURT: I don't think that could be taken into account.

Mr. Goldstein: They might at that time, by reason of what appeared in the newspapers, discuss among themselves as to their understanding as of May 10th, but the conversation might have taken place some time subsequent thereto.

COURT: I don't think you can prove reputation that way. It must be confined to on and prior to May 10th.

Mr. Goldstein: That is true as to the reputation, but I am talking about the conversation. Does your Honor rule that the conversation must be?

COURT: Reputation is formed by what the neighbors, people in the community, say about it. Of course, in this case the reputation must have reference to the time when this offense is charged to have been committed. Now, then, this witness must have learned the reputation prior to or at that time, and what people said about it afterwards cannot control his testimony as to the reputation.

Mr. Goldstein: Isn't reputation also ascertained by the fact that nothing derogatory of a place or person is said?

COURT: You cannot create reputation after the transaction.

(Testimony of J. J. Braund)

Mr. Goldstein: Isn't a man's reputation established by the fact that nothing has been said against him?

COURT: I think if there were other men talked about it afterwards, they should be the men that would testify here; not what they said to this man.

Mr. Goldstein: May I have an exception to your Honor's limitation.

COURT: Yes.

* * * * *

Q. And you say they said that reputation was good?

A. Said it was good at that time, said it was nothing like it used to be in the olden days; one time it used to be pretty fast, but it was pretty good now.

Q. Pretty good?

A. Yes.

Q. They qualified it by the use of the word "pretty"?

A. Yes.

Q. You are sure of that?

A. Well, words to that effect. I wouldn't say they said "pretty".

Q. Might not have said "tolerably fair"?

A. No, they never said nothing like that. It would be about the same thing.

(Testimony of J. J. Braund)

Q. Isn't that the impression you gained from what they said?

A. Yes.

Thereafter, and upon the completion of the testimony offered by the parties and prior to argument defendant requested the court to instruct the jury as follows:

“In connection with the charge against the defendant for maintaining a nuisance, where intoxicating liquor was kept or sold, I instruct you that the word “maintain” as used in the prohibition act means “continuance” and implies a certain degree of “permanence”. Congress by the use of the words “Kept and sold” in violation of law, means either habitually or continually or recurrently so “kept” and “sold”. In other words, a single act or a single sale is insufficient. I therefore instruct you that to constitute a nuisance, the prosecution must satisfy you by evidence beyond a reasonable doubt of the continuance and recurrence of acts or sales in violation of the law. If the evidence falls short of the required proof, your verdict should be for the defendant.”

* * * * *

“The evidence in this case tends to show that Mr. Gates and his associates went upon the premises in question with their own liquor and it is contended by the defendant that they did so with the specific purpose of using their own

liquor as a means of entrapping the defendant in committing a violation of the law. I instruct you that the first duty of officers of the law is to prevent and not to punish crime and it is not their duty to incite or create crime for the sole purpose of prosecuting and punishing it. A conviction will not be sustained where the officers originate the intent and apparently join in the criminal act, first suggested by the officers merely to entrap the defendant.”

* * * * *

“Therefore, if you believe that the defendant was induced by the importunity of the officers to violate the law, that is, if he did violate it, and if through their inducement, he sold the liquor or permitted them to drink the liquor on his premises, then you should return a verdict of not guilty, as it against the policy of the United States Courts to sanction a conviction in any case where the offense was committed through the instigation of public agents.”

And thereafter and at the conclusion of argument of counsel the court instructed the jury as follows:

“Gentlemen of the Jury:

We are approaching the end of this trial, and it becomes the duty of the court to instruct you touching the law of the case, for your edification and to assist you in determining what your verdict shall be upon the testimony and the evidence adduced at the trial.

The case about to be submitted to you is against Fred T. Merrill, and he is charged by an information filed in the court with a violation of the National Prohibition Act. The act, as far as material at this time, makes it an offense for any person to have in his possession intoxicating liquor, or to sell such liquor, and it declares that any rooming house, building, booth or place where intoxicating liquor is manufactured, sold, kept, or bartered, in violation of this statute, is hereby declared a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor, and upon conviction shall be punished as by the statute provided.

The information charges that, on the 10th day of May, 1923, the defendant violated this statute (1) by having in his possession intoxicating liquor, (2) by making a sale of such liquor, and (3) by maintaining a common nuisance, that is, a place where intoxicating liquors are kept, bartered, or sold. The statute defines intoxicating liquor as any liquor fit for beverage purposes which contains more than one-half of one per cent alcohol by volume. And the evidence shows, and about that there is no conflict, that the liquor that the Government claims was purchased from the defendant Merrill is intoxicating liquor within the meaning of the statute.

Now, the defendant has entered a plea of Not Guilty and that plea imposes upon the Government the duty of proving his guilt, to your satisfaction, beyond a reasonable doubt, before you will be justified in finding him guilty. He is clothed by law with the presumption of innocence, and this presumption continues with him, and he is entitled to the benefit of it until it is overcome by testimony.

It is said that the date which is fixed in the information as the time when the offense was committed is not material. It is not material in this way: that it is not necessary to prove the offense charged on the exact date charged. It is sufficient if it is proven approximately to that date. But the offense here charged is an offense which was committed at the time that Gates and the two women went from here to Merrill's place, and that is the offense charged, and it must be proved. You will remember the circumstances: that the parties went out on the 10th, and remained there until the 11th, in the morning, and then returned home. Now, that is the charge, and the one that must be proven in this case.

The information itself which charges the defendant with having committed these crimes is not evidence of the fact of guilt. It is merely an *accusatory* instrument, setting up the charges, but the case itself, or the guilt of the defendant,

must be proven by the testimony which has been offered here, and by none other. You are not, also, to be influenced by what you have read or heard about the case, either during the trial or before the trial. You will confine your consideration and deliberations to the testimony which has been adduced here, both on the part of the Government and on the part of the defendant, and your judgment is to be based upon that testimony, and nothing else, and upon the law that the court gives you.

Now, the question involved in this case is a question of fact; Do you believe from the testimony, beyond a reasonable doubt, that, at the time or about the time stated in the information, the defendant Merrill had possession of intoxicating liquor? If so, and you do so believe, then you should find him guilty as charged in the first count of the information.

The second count charges that, on that same date, he made a sale of intoxicating liquor, and if you believe, beyond a reasonable doubt, that he did so, then you should convict him of that offense.

It is also charged that at the same time he maintained a common nuisance, that is, a place where intoxicating liquors were kept, bartered and sold. Now, a single sale, without more, would not constitute a nuisance. But if, however, a sale is made in a place fitted up for the transaction of business, and in the ordinary

course of business, as if one should approach a bar in the business house, ask for and obtain intoxicating liquor from the manager or person in attendance, although there was but one purchase, it would be sufficient to justify the jury in finding that it was a common nuisance, or a place where intoxicating liquors were kept, bartered and sold.

There has been some evidence offered in the trial of this case tending to show that the establishment conducted by the defendant and known as the Twelve Mile Roadhouse, bore a common reputation as being a place where intoxicating liquor was kept and sold, and I instruct you that this is competent evidence and should be considered by you in determining whether or not the defendant is in fact guilty of maintaining a nuisance at the time and place and in the manner charged in the information. A subsequent raid, as you will remember by the testimony, was made upon the roadhouse of date May 15th. This you may take into consideration, and what happened and what was found there, on the question whether the defendant was maintaining a nuisance as charged, and that testimony must be considered in that light, and that is the purpose for which the court admitted it here.

Now, as I have said, the proof must satisfy you of the defendant's guilt beyond a reason-

able doubt. A reasonable doubt simply means such a doubt as would cause a reasonable prudent man to hesitate to act in his own important affairs. It does not mean a mere possible doubt. It does not mean such a doubt as a jury might conjure up in its own mind based upon sympathy for the defendant, or upon a feeling that the law ought not to be enforced, or upon the methods adopted in securing the evidence. But it is a doubt based either upon the testimony or the want of testimony. And if, after you have considered all the evidence, you entertain such a doubt, you should give the defendant the benefit of it and an acquittal. If, on the other hand, you do not, then it is your duty, under your oaths, to find him guilty.

This is a prosecution under the National Prohibition Act, and neither this court nor the jury are concerned with the wisdom or propriety of that act. We are not sitting here as legislators, nor are we sitting here as executive officers charged with the duty of enforcing the law. We are simply called upon to determine whether, under the evidence in this case, the defendant has violated the law; and if he has, he should be convicted. If he has not, or if you have a reasonable doubt on the subject, you should acquit him, and that regardless of whether you approve or disapprove of the law. You may believe that the law was unwise; you may

think its provisions are unwise; but that is not a matter with which you have any concern. On the other hand, you may feel, some of you, that this is a wise law and ought to be enforced, and are disposed to feel that one charged with its violation should be convicted. But the fact that you may approve the law or not should not influence your verdict one way or the other in this case. It is simply a question for you to say, under this testimony, whether the defendant is guilty as charged.

You are the exclusive judges of the credibility of the witnesses. Every witness is presumed, under the law, to speak the truth. The law presumes that one who comes into court and takes an oath to tell the truth, the whole truth, and nothing but the truth, does so. But this may be overcome by the manner in which a witness testifies, by his or her appearance upon the witness stand, or by contradictory testimony. You have seen these witnesses. You have heard them testify. You have noticed their appearance on the witness stand. And now it is for you, and you alone, to determine and say what weight is to be given to the testimony of each and every one of them. It is your duty, if you can, to reconcile the testimony on the theory that each and every witness has told the truth as he understands it; but, if you are unable to do that, then you should take the testi-

mony of the witnesses that seem to you most reasonable and probable under the circumstances.

Now, there is a sharp conflict in the testimony as to what occurred on the journey from Portland out to the Twelve Mile House. Mr. Gates and his companions, Mrs. Johnson and Miss Meade, testify that no liquor was in the possession of the party, and no liquor was drunk by any one on that journey. The taxicab driver, however, testified that Mr. Gates had a bottle of liquor, that he drank from it three or four times on the way out, and that he offered it to him, the taxicab driver. Now, if these witnesses have reference to the same journey and the same transaction, there is such a sharp conflict in the testimony that, from any standpoint, it is impossible to reconcile it. One or the other of the parties if they refer to the same transaction, was telling that which was not true. It was not a matter about which people could be mistaken. Either Mr. Gates did have liquor and drank it on the way out there, or he did not. Therefore, there is such a very sharp conflict in the testimony on that question that, if they have reference to the same journey there is not, in my judgment, any way to reconcile their testimony. You will therefore have to find, as far as that matter is material, that one or the other of them told that which they knew to be untrue.

However, this is not the crux of this case, and that is not the controlling question in this case. Whatever Mr. Gates may have done on the way out, or however much he may have drunk on the way out, if he did drink, would only go to his credibility as a witness, and would be no defense or excuse for a violation of the law by selling him liquor after he got out to the roadhouse, because it is just as much a crime to sell to a drunken man as it is to sell to a sober man. So that the real question in this case is what occurred after these parties arrived at the roadhouse; and you have a right, and it is your duty, of course, to consider their condition at that time, the circumstances surrounding the transaction, as going to their credibility; but if you believe, from the evidence, beyond a reasonable doubt, that, after they arrived at the roadhouse Mr. Merrill sold to them, or any one of their party, intoxicating liquor as claimed by the Government—if you believe that beyond a reasonable doubt, then it would be your duty to find him guilty, notwithstanding you may think that Mr. Gates was drunk, or had been drinking, or that he had told what was untrue of some other transaction. Of course, if the testimony of a witness be deliberately false in one particular, it is to be distrusted in all.

Now, it also appears that the witnesses for the Government in this case were either prohi-

bition enforcement officers, or members of the sheriff's force, or the two ladies who accompanied Mr. Gates on his journey. Now, they are not to be discredited as witnesses because of their occupation. Their credibility is to be judged the same as that of any other witness, and, of course, their occupation is to be taken into consideration by the jury in weighing their testimony, and the purpose for which they made the journey is an important matter to be considered. But if you believe they were telling the truth, then you have no right to discredit their testimony because they were Government officials or in its employ. In judging the testimony of the witnesses, you should, of course, consider their interest and their relationship to the parties, their relationship to the prosecution or the defense, but the same rule should apply in considering the testimony of the witnesses who have testified on behalf of the defendant in this case

It is also in evidence that, after these parties arrived at the roadhouse, they feigned, as one of the witnesses said, intoxication; if they were not really intoxicated, they at least feigned intoxication. Now if they did that, and the sale was made as claimed by the Government, it would be no defense in this case. One cannot be induced or persuaded by a Government officer to commit a crime, and then be

prosecuted, but a Government officer may lawfully afford an opportunity for the commission of an offense, and the testimony of the Government in this case tends to show that that is all these Government witnesses did. They went out to this roadhouse; they, as one of them said, attempted to create an atmosphere that would make it possible for them to buy liquor at that place. You may not approve of that method. It may not be the best method. I don't know. But it would be no excuse or defense for the violation of the law. It may go to the credibility of the witnesses, but if you believe that the sale was made as claimed, then it would be a violation of the statute.

Now, the defendant has testified in his own behalf. He has denied the charges, denied on his plea of not guilty and on the stand the charges made against him. You should apply to his testimony the same test you do to that of any other witness, and give it such weight and credit as you think it is entitled to, keeping in mind, as you should, however, in weighing his testimony, the interest he naturally has in the result of the prosecution.

In the trial of a case of this character, the functions of the court and jury are separate and distinct. It is the duty of the court to pass upon questions of law and the competency of the testimony; but it is the duty of the jury, and

the sole duty of the jury, to pass upon all disputed questions of fact; and the court has no desire, or no right, to invade your province and undertake to determine any question of fact, and therefore, if at any time during the progress of this trial, the court has intimated in any shape or form its views upon any question of fact in the case, or the credibility of any witness or the weight of any testimony, you are to disregard it. You are, under your oaths, required to disregard it, unless it conforms with your own views. The responsibility for this verdict in this case must rest upon the jury, and not upon anyone else.

Now, the punishment that may follow a verdict of guilty is not a matter to be considered by the jury. Your province and your duty is to determine whether or not the defendant is guilty of the crime charged against him, and if you believe beyond a reasonable doubt that, at the time or about the time stated in the information, as claimed by the Government, the defendant sold to Mr. Gates or members of his party intoxicating liquor, as they claim, and under the circumstances as stated by the Government witnesses, then he is guilty of all three crimes charged in this information, and you should so find by your verdict. If, on the other hand, you do not so believe, or if you have a reasonable doubt upon the subject, then it is your duty to give him the benefit of it and to acquit.

Thereupon the following exceptions were taken thereto:

Are there any exceptions?

Mr. Goldstein: If the court please, defendant desires to have an exception only to the failure of the court to give the requested instructions, or in giving the instructions requested as may have been modified as given by the court.

Now, I believe your Honor has made clear that the only case that the jury have a right to consider is that incident connected with May 10th, which is what we know now as the incident concerning Gates and his party, and that the other evidence is merely collateral and incidental, depending upon their belief as to whether or not the facts as stated by Mr. Gates have been established by the evidence. I think it should be made clear to the jury that, if they do not believe the testimony as given by Mr. Gates and his party, they have no right to take into consideration any of the evidence concerning the May 15th transaction, or any of the evidence concerning the waiter.

COURT: I think the instructions are clear enough about that.

Mr. Goldstein: And also in the court not limiting the testimony of the waiter. I believe he overlooked instructing the jury about that. They have no right to consider that except as it

might tend to corroborate, assuming that they believe the offense took place on May 10th.

COURT: What is it you refer to?

Mr. Goldstein: Plaintiff brought in a waiter—Nickell, I believe—as to something that took place in April, prior to this, and which is not the basis of this allegation or charge. May I have the record show they would not have a right to consider that unless they believe the charges alleged in the information have been established as to May 10th.

COURT: I think I have made that clear.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Mr. Goldstein: May I have an exception to this: What is meant by possession of liquor as defined by the act, it must be, as I take it, possession with intention of selling; not mere possession.

COURT: I think you are wrong about that.

Mr. Goldstein: May I have an exception on that? I appreciate your Honor and I may differ about that.

COURT: Yes.

Mr. Goldstein: Also with respect to your Honor's instructions as to what constitutes a nuisance, and the right to adduce evidence as to the general reputation, and the instruction as to entrapment. May I have an exception to that?

COURT: You may have your exception.

It is hereby stipulated and certified that the foregoing instructions set out herein as having been given by the court to the jury are all of the instructions given by the court to the jury.

Thereafter, the jury returned into court a verdict of guilty as charged in the information.

And thereafter, and within the time allowed so to do, defendant moved for a new trial of said cause which motion was thereafter argued and denied and to which ruling defendant was allowed an exception.

Thereupon, defendant moved the court to arrest judgment upon said verdict which motion was thereafter argued and by the court denied, to which defendant was allowed an exception.

And now because all the foregoing matters and things are not of record in this case, I Charles E. Wolverton, being the Judge who tried the above entitled cause, do hereby certify that the foregoing Bill of Exceptions correctly states all the proceedings had before me on trial of said cause so far as they pertain to these particular exceptions and correctly states all the rulings of the court upon the questions presented and that the exceptions taken by the defendant were duly taken and allowed; that the foregoing Bill of Exceptions was prepared and submitted within the time allowed by order of the court and is now signed and settled as and for a Bill of Exceptions in said cause and made a part of the record therein.

In witness whereof I have hereunto set my hand
this 10th day of Janury, 1925.

CHAS. E. WOLVERTON,
United States District Judge.

Endorsed: Filed Jan. 10, 1924.

G. H. Marsh, Clerk.

And afterwards and on the — day of —, 1925, there was duly filed in said court a

(Title)

STIPULATION

in words and figures as follows, to-wit:

The attorneys for the plaintiff in error herein having prepared and compared the original record with the within printed transcript, now, therefore, it is hereby stipulated and agreed by and between the parties to the within proceedings for Writ of Error, by and through their respective attorneys, that the within printed record tendered to the clerk of the United States District Court for the District of Oregon for his certificate, is a true transcript of the record in the within cause and that the clerk of said court shall certify the said printed transcript without comparison thereof with the original record.

Of Attorneys for Plaintiff in Error.

Of Attorneys for Defendant in Error.

Dated:

Clerk's Certificate

United States of America, District of Oregon—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the attorneys for the Plaintiff in Error is a true transcript of the record in this cause and that I shall certify same without comparison.

Now, therefore, in accordance with the within Stipulation, I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify without comparison with the original thereof, that the foregoing transcript of record upon writ of error in the case in which Fred Merrill is defendant and plaintiff in error and the United States of America is plaintiff and defendant in error, is a full true and correct transcript of the record and proceedings had in said court in said cause as the same appear of record in my file and in my custody, the same having been compared by attorneys for plaintiff in error.

And I further certify that the fee for certifying to the within transcript, to-wit the sum of \$——, has been paid by the said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said district, this —— day of ——, 1924.

Clerk of the District Court of the United States
for the District of Oregon.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have compared the foregoing printed transcript of record on writ of error to the said court in a cause in which the United States of America is plaintiff and defendant in error and Fred Merrill is defendant and plaintiff in error. And that the said printed transcript as corrected by me is a full, true and correct transcript of record and proceedings had in said court in said cause as the same appear of record and on file in my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$42.50 and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 20th day of February, 1925.

(Seal)

G. H. MARSH,
Clerk.

